Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975.

No. **75-1102**

CHARLES W. BOWEN, JR., d/b/a SUBURBIA NEWS DELIVERY SERVICE, RICHARD CARTABUKE d/b/a R. CARTABUKE NEWS DEL., JOSEPH DITTA and JOSEPH FAILLA, DELLA DAVIS, SOL L. GOLDBERG d/b/a PLAINVIEW NEWS DELIVERY, THEODORE MARKOWITZ d/b/a A.M.F. NEWSPAPER DELIVERY SERVICE, FRANK MIRRO and EMANUAL MIRRO d/b/a FRANDEL NEWS SERVICE, JACK POSEROW as Assignee of VALLEY STREAM NEWS SERVICE, INC., BENJAMIN and FLORENCE ROSENBLUM d/b/a STEVANS NEWS SERVICE, HOWARD B. SCHULZ and MARGARET SCHULZ d/b/a NEWSDEALER, KENNETH SWEENEY, JOHN KAHRS d/b/a NEW YORK NEWSPAPER DELIVERY, FLORAL PARK NEWS DELIVERY, INC., HUNTINGTON NEWS DELIVERY, INC., EDWARD A. SHANK d/b/a FLORAL PARK NEWS SERVICE, HARRY FOX d/b/a MERIT NEWS COMPANY, JACK GULLO d/b/a F. & M. NEWS SERVICE, WALTER GREENBERG d/b/a PARK NEWS SERVICE, SALVIN SALES CORP., HAROLD O. RATHSAM d/b/a AROL NEWSPAPER SERVICE, HUGH HOLMAN d/b/a NASSAU NEWSPAPER DELIVERY, EDWARD PERROT d/b/a LINCOLN HOME NEWS,

Petitioners,

against

NEW YORK NEWS, INC., JACK UNDERWOOD, ROBERT O SULLIVAN, ANTHONY CATANZARO, DAVID AUERBACH, DONALD A. NIZEN, GABRIEL LEWANDER, F. M. FLYNN, WINFRED JAMES, JOHN ERWIN also known as JOHN IRWIN, SY HECHT, ERNEST SMITH, JOSEPH CONWAY, P. PASTORELLI, J. PASTORELLI, BERNARD F. SMITH, HOWARD KENT, E. DEBELLA, MRS. ARTHUR C. ELLERMAN, RAYMOND LEDDA, MICHAEL LEPORE, VICTORE LEPORE, ARNOLD BLUME, WALDO RODRIGUEZ, E. CAPAZZI, RONALD PARKHURST, W. JOUBERT, C. McNALLY, J. RABEN, CHARLES ASHDOWN, J. OCCHINO, R. CARRELL, B. SMITH, and "JOHN" REILLY (whose first name is presently unknown) and "JOHN DOE", "RICHARD ROE" and "JANE DOE", being persons whose identities are presently unknown to plaintiffs,

Defendants.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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NEW YORK NEWS, Inc., *et al.*,

Defendants.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, all of whom are or have been independent route dealers (home deliverers of all newspapers), hereby petition for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Second Circuit, 1) insofar as it reversed the findings and judgment of the United States District Court for the Southern District of New York, which had held that certain agreements of the New York News with its franchise dealers (dealers who re-sold copies of The News to newsboys) were illegal price-fixing agreements *per se,* that the franchise agreements contained illegal territorial and customer restrictions further in violation of Section 1 of the Sherman Act, and that the defendants had conspired to monopolize part of the newspaper home delivery market in violation of Sec-

tion 2, such reversal being without any opportunity for a determination as to whether the aggregate of price-fixing, boycotting, territorial and customer restrictions, price and other discriminations, termination of certain plaintiffs and harassment constituted unreasonable restraint of trade even if not *per se* violations; and 2) insofar as that decision affirmed denial of plaintiff's claims for price and other discriminations under Robinson-Patman.

Opinions Below.

The opinion of the United States District Court for the Southern District of New York (per Bauman, J.) is reported at 366 F. Supp. 651, and is appended hereto as Appendix A. The decision of the United States Court of Appeals for the Second Circuit is reported at 522 F. 2d 1242, and is appended hereto as Appendix B.

Jurisdiction.

The judgment and order sought to be reviewed was made and entered on July 23, 1975. On August 1, 1975, a motion was made to extend the time to file a petition for rehearing to and including August 27, 1975, which motion was granted and entered on August 8, 1975. An order, without opinion, denying the timely motion for rehearing (*en banc*) was made and entered on November 5, 1975. The statutory provision believed to confer on this Court jurisdiction to review the judgment and order in question is 28 U. S. C. §1254(1).

Questions Presented for Review.

1. Whether the Second Circuit properly discharged its appellate function under Rule 52(a) of the Federal Rules of Civil Procedure, under which the findings of the trial Court are not to be set aside unless "clearly erroneous," when:

a) Though the parties had testified and stipulated at trial, as confirmed by exhibits, and without contradiction, that, pursuant to the price-fixing agreements between The New York News and its franchise dealers, the franchise dealers re-sold copies of The News to newsboys (and were hence wholesalers), and that the news boys re-sold to the ultimate consumers (and were hence retailers), and the trial Court so found, the Court of Appeals reversed such findings on the basis of its own new and inconsistent findings as to which there was no evidentiary support in the record whatsoever,— that The News sold directly to consumers—, and

i) the contentions upon which the Court of Appeals reversed never having been raised below, and the uncontradicted testimony having been that The News did not sell directly to consumers, and

ii) the Second Circuit thus permitting the appellants before it to appeal successfully on the grounds that their uncontradicted trial testimony was not true, and

b) The Court below merely affirmed the trial court's findings of a lack of intent to monopolize, while ignoring the evidence of The News' intent to destroy or seriously injure the independent route dealer system so as to deprive potential publisher

competitors of access to the home delivery market through the cost-free route dealer system, such intent to monopolize being shown by i) termination of route dealers who would not become franchise dealers, while advising them that, to become franchise dealers, they would have to give up other newspapers or dispose of them, and that there was no time to sell their routes; ii) termination of suppliers of terminated route dealers; iii) The News having had no home delivery department until 1964, and having made no serious effort to increase home delivery circulation before introduction of the franchise system, adopted without having made any cost studies, and iiii) the cost studies later made before the franchise system became operative in 1966 showed that The News would lose money by the franchise system, and in much larger amounts than those studies showed it would lose from obtaining the same increase of circulation through the route dealer system, and

c) The Court merely affirmed the trial Court's finding of The News' lack of intent to monopolize, ignoring the overwhelming evidence of such intent, such as that The News' franchise program had been planned so that The News would lose money, its termination of route dealers who would not become franchise dealers while denying them the opportunity to sell their routes, termination of suppliers of terminated route dealers, and a series of predatory acts including surveillance, false arrest and malicious prosecution, the intent of all of which could only have been to destroy or seriously injure the route dealer system in order to prevent any new or existing newspaper from having access to the cost-free home delivery system provided by the route dealers?

2. Whether the price fixing agreements between The News and its franchise dealers were illegal *per se*, and not immunized by the McGuire Act, 15 U. S. C. §45(a), because i) such agreements were between wholesaler and wholesaler, or, under the reasoning of the Court below, between retailer and retailer, the Court below having found that both The News and the franchise dealers were retailers, and ii) because The News was not in free and open competition with commodities of the same general class?

3. The trial Court having found *per se* price fixing violations and therefore never having determined whether The News' franchise system, encompassing an aggregate of trade restraints (termination of route dealers unwilling to become franchise dealers, denial of opportunity to sell routes before becoming a franchise dealer, boycott, price-fixing, territorial and customer restraints, and resultant restraints upon circulation of The News and other papers) constituted an unreasonable restraint of trade, in violation of Section 1 of the Sherman Act, a) was it error for the Second Circuit to rule that there were no *per se* violations, without remanding for trial or finding on the issue of whether there had been an unreasonable restraint of trade, and b) were petitioners thus denied an opportunity for a judicial determination after a hearing, and thus deprived of property without due process of law in violation of the Fifth Amendment?

4. Whether the Court below properly found a lack of standing of plaintiff route dealers to attack territorial restraints upon franchise dealers on the theory that a route dealer was thus assured of facing competition from no more than one franchise dealer, when in fact the record showed that there were several franchise dealers at the same time in most route dealers' areas?

5. Did the Second Circuit err in ruling that a retrial of the Section 2 claim upon remand was unnecessary because of its affirmance of part of the Section 1 claim, though the standard of proof of damages under the Section 2 claim would be much broader than the narrowly prescribed standards for damages laid down by the Second Circuit for the Section 1 claim?

6. Whether there is a requirement of proof of specific intent in cases involving conspiracy to monopolize, as opposed to cases involving attempts to monopolize and whether such intent appears here?

7. Was the refusal of The News to deal with plaintiff route dealers who had failed or refused to enter into price fixing agreements, plus other acts by the respondents—including a) detection by respondents of the sources of plaintiffs' supply, which were themselves then to be terminated by the publisher; b) terminating or threatening to terminate all sales to such sources of supply or reducing the number of copies the source receives so that it could no longer be a source of supply; c) constant surveillance by franchise dealers, the publisher's employees and armed off-duty policemen; d) the publisher instructing its franchise dealers to falsely tell route dealer's customers (potential, former and current) that the plaintiffs were out of business and that they could obtain home delivery of the newspaper only through the franchise dealers—an unlawful conspiracy to eliminate intrabrand competition in the home delivery market by monopolizing trade in the said newspaper, in violation of Section 2 of the Sherman Act?

8. a) Did the territorial and customer restrictions in the franchise agreement, which the publisher conceded prevented franchise dealers from selling to other than newsboys and from selling outside their allocated territories, violate Section 1 of the Sherman Act, because the publisher parted with title, dominion and risk of loss when it sold its newspapers to franchise dealers without the right to make returns and without supervision over the actual home delivery, whether or not such restrictions were ancillary to price fixing, and

b) Did plaintiffs have standing to attack such restrictions?

9. Was it error to dismiss the claims of the plaintiffs for violation of the Robinson-Patman Act, in the light of price and delivery discrimination practices in favor of the franchise dealers and against the route dealers by The News, on the ground that no sales to any of the plaintiffs occurred in interstate commerce, though the franchise system involved such discriminations in interstate commerce, the prices of the newspaper out of state being determined on the same basis as within the state, and the copies of the newspaper sold being composites of news, features, advertising and paper, all of which had crossed state lines?

Statutory Provisions Involved.

The following statutory provisions are involved in this case: Sherman Act, §§1 and 2, 15 U. S. C. §§1 and 2; Robinson-Patman Act, 15 U. S. C. §13; McGuire Act, 15 U. S. C. §45a; Federal Rule of Civil Procedure 52(a); New York Education Law §3228; First and Fifth Amendments, United States Constitution.

Their pertinent text is reproduced herein as Appendix C.

Statement of the Case.

A. Home delivery by The News prior to 1966.

Newspaper home delivery in the New York City metropolitan area has traditionally been handled by independent route dealers, such as plaintiffs, who purchase routes and home deliver all newspapers, including special interest newspapers, to customers on such routes. This involves some 20-22 newspapers (65a).*

The News conceded that it did practically nothing with regard to developing home delivery sales in Nassau and Suffolk Counties (part of New York City's metropolitan area) prior to 1963 (477a), and indeed had no home delivery circulation department until 1964 (1214a). Between 1963 and 1966, the only efforts towards developing such home delivery circulation made by The News were occasional samplings and telephone solicitations (477a), with route dealers cooperating in these limited promotional efforts—even though The News on occasion did not pay some of them as promised (85a-86a, 182a-183a, 416a)—with the route dealers doing their own solicitation of orders.

In early 1965, The News began several pilot test franchise programs in areas where there were no independent route dealers, the newspapers being home delivered at less than the cover (newsstand) price (965a-967a), one of which showed a substantial gain in circulation, starting

*Such references are to the Appendix to the record filed in the Second Circuit below, a copy of which Appendix will be certified to this Court. The Appendix contains all the testimony.

from zero delivery. No evidence was offered by The News as to the success of the other programs, or of any controls by attempting to have route dealers develop the same or similar virgin territories (965a-966a, 837a-838a).

Though The News was assigning franchise territories by September or October of 1965 (718a-721a, 831a-834a, 837a-838a), studies were first made by The News in early November, 1965, to determine the cost of achieving a specified expanded circulation through the independent route dealer system as against achieving the same increase via the franchise system. These studies (Pl. Exs. 98 and 99, 1401a-1404a) showed a spiralling cost in both cases, but with the cost of achieving the same increased circulation through the franchise method ranging (in different years) from over 500% to 17% greater, both studies projecting net losses from the increase of sales. No evidence whatsoever was introduced to show that advertising revenues increased, or that an expected increase in advertising revenues was considered, in determining whether to embark upon the program.[1]

The News later revised its figures of net losses substantially upward (Pl. Ex. 97, 1399a), the projection of the cost of the franchise system being some three times

[1]If clear errors in the cost studies are corrected, the projected net loss in obtaining the same increased circulation via the franchise method ranges from seven to three times higher. The errors were: (1) The clearly invalid assumption that the actual cost of printing and delivering the same increased number of copies of the paper would be hundreds of thousands of dollars higher for route dealer distribution than for franchise distribution; (2) Lessening the costs of the franchise system by an amount for "Savings on Returns" though the route dealers had no return privileges. Revised figures making such corrections were submitted as Appendices A and B to our Proposed Findings of Fact in the District Court.

greater than for obtaining the same increase in home delivery through the independent route dealer system, again with the cost of the independent route dealer system development being grossly overstated.

No evidence was ever offered to explain why The News adopted a method of increasing circulation to incur losses, nor why it sought to incur heavier losses by using the more expensive franchise system. The franchise system did give The News the control it desired over price, exclusivity of product and method of distribution (1000a), while the independent route dealer system provided a cost-free method of home delivery to existing newspapers as well as to possible new entrants into the marketplace of newspapers, route dealers buying at wholesale rates from the newspapers (or their distributors) and reselling at retail to their customers for an added service (delivery) charge.

B. Termination of 16 plaintiffs.

In late 1965 and early 1966, a number of the plaintiff route dealers were contacted and offered the opportunity to become franchise dealers, which meant they would have to give up their then routes, sell only The News, not at their price to their own customers, but to newsboys at the maximum price stipulated by The News. Every route dealer who was invited by The News to become a franchise dealer was told in the letter of invitation that boys had to be used, the letters of invitation uniformly noting that "The News is seeking the services of qualified men to supervise the boy delivered franchise district" (see Pl. Ex. 23, 1363a, and Pl. Exs. 27, 30, 31, 37, 47 and 75, not reproduced in the Appendix). It was admitted by The News that the franchise system was a boy system (1228a); route dealers and other prospective franchise dealers were told they had to use boys in the franchise system (88a, 89a, 341a, 703a-704a, 833a), counsel for

The News noting that a purpose of the franchise system was "to establish a boy system * * *" (355a).

Plaintiffs who were offered the opportunity to become franchise dealers were told by The News that they would have to give up other newspapers (207a, 303a, 349a, 384a, 599a, 661a) or dispose of that part of the route (773a). The two plaintiffs who stated that they wanted to sell their routes were told by The News that there was no time to do so (89a, 325a, 340a, 341a).

The plaintiffs were told that if they did not agree to adhere to all the provisions of the franchise agreement, their supplies of The News would be cut off. None of the plaintiffs were willing to bow to its restrictive terms, and within a short time, beginning on January 10, 1966, 16 of the plaintiffs were terminated by The News (1263a).

There ensued a conspiracy by The News and its franchise dealers to prevent the 16 terminated plaintiffs from obtaining copies of The News, which findings of conspiracy were upheld by the Second Circuit (App. B, *infra*, pp. 81a-85a), including harassment under which varying of the plaintiffs were followed, in cars manned by armed off-duty policemen, in efforts by The News to find out the source of supply of terminated franchise dealers, delivery to which sources of supply would be terminated (850a-851a), culminating in plaintiff Markowitz being arrested for allegedly stealing what were his own newspapers. The charges against Markowitz were dropped when The News was unsuccessful in its attempt to obtain perjured testimony in an effort to convict Markowitz (624a-626a).[2]

[2]Plaintiff Markowitz's separate claim for false arrest and malicious prosecution was pursued in a separate action in the New York Supreme Court, settled in November, 1975, for $50,000, moments before a jury would have returned a verdict in his favor for $157,500. Markowitz's claims for violation of antitrust laws survived the settlement, by agreement.

C. The status of the franchise dealers and The News as wholesalers.

Counsel for The News stated in his opening that "The franchise dealer is in effect, as Mr. Levy [plaintiff's counsel] noted, a wholesaler. He buys the papers and resells them to a carrier boy who then makes the sale to the subscriber" (59a).

At a later point, counsel engaged in the following colloquy:

> "Mr. Levy: As I understand it, under the franchise agreements, The News wholesales to the franchise dealers who in turn wholesale their papers to the news boys, who eventually do the charging and billing. Is that correct?
>
> "Mr. Hughes [counsel for The News]: I wouldn't use the word wholesale all the way down the line there, but that is basically correct. The News sells to the franchise dealer at a price. The franchise dealer sells to the carrier boy at a price. The carrier boy sells to the subscriber at a price • • •" (137a).

Still later, counsel for The News noted the following:

> "This was strictly a vertical arrangement, your Honor, where we dealt with the price which, of course, we had the right to fix, initially to our customer who purchased from us, the franchise dealer. Under the Fair Trade Law we had the right to fix the price at which he re-sold, and to the extent that he is a wholesaler in that he delivered to the boys and the boys re-sold, we had the right to fix that price" (914a-915a).

The testimony of the witnesses was in accord. Thus, The News' Circulation Director Underwood, its principal witness, testified that "We fixed the price at which the boy sells to the ultimate consumer and we fixed the price

at which the franchised dealer sells to the boy • • • (1140a). Then, relating the chain of distribution, Underwood went on to note that "The paper is produced by The News, The News distributes to the franchised dealer, the franchised dealer distributes to the boy, the boy distributes to the home," and that under the franchise system, "The News fixes all of those prices" (*ibid.*).

Underwood expressly disclaimed that there were any occasions where The News sells directly to the carrier boy or to the ultimate consumer, in the following colloquy:

> "Q. Are there any occasions when The News sells directly to the carrier boy in the franchise system? A. No.
>
> "Q. Are there any occasions where The News sells directly to the ultimate consumer for purposes of home delivery in any area where the franchise system is established? A. No. That would only be mail" (1140a).

An envelope was used by the franchise dealer, whose use was specifically approved by defendant Catanzaro of The News (Pl. Ex. 84, 1366a; 915a-916a), which was given to the boys, which contained the following, addressed to the boy carriers:

> "Your billing rate is $.0787 per daily paper and $.2375 for Sunday paper. The difference between this rate and the retail rate you charge your customer gives you a profit margin of $.1903 per daily and Sunday customer."

The franchise system did not provide for reimbursement to the news boy if he did not collect from his customer. Thus, defendant Lepore testified as follows (858a-859a):

> "Q. Suppose one of the kids on the route did not collect from his customer, whose loss was that? A.

> Well, technically that should be the carrier boy's loss. In our particular case, we have a policy where we reimburse the carrier for any losses. But there is no provision, as far as the franchise system is concerned, to reimburse the carrier."

Franchise dealer Carter further testified as follows:

> "Q. Suppose one of the boys didn't collect from his customer, whose loss was that? A. Well, that was the carrier boy" (744a).

Circulation Director Underwood of The News testified (1136a-1137a) that the use of a boy system "provided for us an automatic sales force," with about 5,000 boys involved in the program.

All of the franchise agreements provided that the franchise dealer "is and shall remain an independent contractor and not an employee or agent of The News" (1262a).

The franchise agreements themselves further reflected the relationship between the franchise dealers and the boys. Thus, in an interim agreement, in letter form addressed to the franchise dealers, the franchise dealer was told that "You will not charge any carrier boy making such deliveries and collections more than the presently established wholesale rate * * *" (1350a). In the final agreement, Plaintiffs' Exhibit 10, it was provided in II(b) that the franchise dealer agrees "(b) To supervise and direct the delivery and *resale* of copies of The Daily and Sunday News to such regular subscribers in his territory at no more than the regular established home delivery price" (1355a). (Italics supplied.) III (d) of the final agreement again restates the relationship, providing that the franchise dealer would not "Charge any carrier boy engaged in making deliveries and collections

in his territory more than the price established therefor by The News" (1358a).

The records of The News showed sales by the boys (Deft. Exhs. O and P, 1100a, 1101a, 1419a-1422a). The boys did the canvassing, soliciting and sampling (214a, 217a, 255a, 333a). The franchise dealer sampled himself only before his route became operative (750a, 751a, 922a), after which the boys and the franchise dealer both did soliciting (924a). There was no evidence in the record to show that The News did any sampling. It merely solicited orders, by telephone, in an area only after the boys had finished soliciting there (924a). The News' ads for boys, contained in Plaintiffs' Exhibit 12, introduced in evidence at 191a-192a, noted often that boys were wanted to canvass, as well as deliver. And the testimony of The News was that the "major part of the orders came from boys soliciting" (925a).

D. The operation and effect of the franchise system upon competition and circulation.

Because of the way the franchise system was developed (see, *infra*, pp. 17-18), the franchise dealer could not in the beginning of the operation of his route cover all customers within that route. Thus, some customers in plaintiff Markowitz's area were not able to purchase The News from the franchise dealers in his area until 1972, though plaintiff had been terminated in 1966. Had Markowitz gone out of business, some 150 daily and 200 Sunday customers for The News would not have been serviced with any newspapers until 1972 (94a-95a). When a terminated route dealer did go out of business, as did plaintiff Bowen, there was no delivery made of the Times, Wall Street Journal or other papers, although by the time of the 1972 trial there was someone servicing parts of Bowen's area (414a-415a). Similarly, a route dealer

who had been terminated in early 1966 abandoned the route; for several weeks thereafter, it was not serviced with any newspapers except for copies of The News, until plaintiff Davis moved into the route (497a-498a). As the difficulty increased in securing papers, plaintiff Davis ceased delivering The News to customers unless there was a Times subscriber on the same block, a practice which began in 1968 (535a-536a).

After the terminated route dealers went great distances to secure copies of The News, they were unable, even then; to secure enough copies of The News to fully service their customers. Thus, Bowen on numerous occasions received no deliveries of The News (419a-420a), and on five occasions received no copies of The Sunday News (451a). Gullo, for a month after termination, was able to service only a few of his News customers (661a-662a); Mirro was unable to service his customers on certain occasions after May 9, 1966 (638a); Perrot was able to get enough papers to service only 50% of his customers the first day, and 75% of his customers the second day after termination, with Perrot then having 315 News customers (649a); and Sweeney was unable to service any of his customers with The News for a couple of weeks after termination (216a).

Former franchise dealer Carter testified that although the date of his written contract was January 7, 1966, he did not start delivering copies of The News in his territory until February, 1966. Had terminated route dealer Markowitz not distributed copies of The News at that time, there would have been no distribution of The News at all in Carter's territory until February, 1966 (729a).

In the two Lepore franchise territories, each about twenty square miles in area, after the major route dealers

went out of business in or about 1968, there have been no New York Times deliveries in most of those two areas. Only about 15 to 20% of one area has home deliveries of The Times; although there are some Sunday home deliveries, in the other area, there is no normal delivery of the daily editions of The Times or The Wall Street Journal (834a-838a).

The franchise home routes were developed by sampling one boy route, of 200 dwelling units, for a week, and beginning regular service on that route thereafter at the rate of one boy route per week (839a). Thus, there were no deliveries of The News by either of the defendants Lepore during the first week of operation, and it was two weeks after January 10, 1966, before the first deliveries of The News to Lepore customers began (840a-841a). The routes were developed extremely slowly (844a-846a, 922a-924a), and there is still a square mile of the Lepore routes where no newspaper deliveries are being made (846a-847a). It was not until late 1968 that the coverage of the areas by the Lepore's was pretty much total, with the exception noted above (848a). And prior to the Lepore's going into an independent route dealer's territory, the territories had been fully serviced with all newspapers by independent route dealers (913a).

When the independent route dealers had been invited to become franchise dealers, The News did not have a franchise man ready to work on that area in most cases (971a). The News conceded that even when the franchise dealer was ready to go into an area, it would be from one to four weeks before a franchise man could start in regularly delivering any papers at all, so that unless an independent route dealer who had been terminated was able to get copies of The News elsewhere, all News subscribers in that area would be without home

delivered copies of The News for that one to four week period (969a-970a).

When The News received home delivery orders for an area in which there was no franchise dealer, the orders were destroyed, and the customers were not notified thereof (895a-896a).

There are less newsstands in the suburban area of Long Island (Nassau and Suffolk Counties) than in New York City, and less other retail outlets for newspapers, such as stationery, candy and drugstores (983a-984a). From 1966, until at least 1970, in a number of New York City suburban areas, where newsstands exist, a number of them were closed on Sundays and holidays, such as railroad stations. Thus, persons living in a suburban area could only receive copies of newspapers through delivery to their homes, unless they are willing to travel long distances (802a, 983a-984a). For example, about 80% of the circulation of The News in the Lepore territories is home delivered (894a).

E. Price and other discriminations against the route dealer in favor of the franchise dealer.

It was undisputed at the trial that The News subsidized the franchise dealers till they reached a certain level of revenue, and at all times sold to the franchise dealer at a much lower price than it sold to the route dealer. Additionally, a special franchise delivery system was set up, which resulted in delivery of copies of The News to the franchise dealers several hours earlier than to the route dealers.

F. Proceedings in the District Court and Court of Appeals.

After agreement as to a bifurcated trial, first on liability, then on damages, the liability trial was held in

May of 1972, a non-jury trial. In June of 1973, Judge Bauman held that The News' franchise agreements were illegal price fixing agreements; that sales of copies of The News to the plaintiffs had been discontinued in furtherance thereof, that the franchise agreements contained illegal territorial and customer restrictions, all in violation of Section 1 of the Sherman Act. He further ruled that the defendants had conspired to monopolize part of the newspaper home delivery market, in violation of Section 2. The Court thus upheld the claims that route dealers who had been terminated by The News on or after January 10, 1976, as well as those who continued to receive copies of The News from The News and who operate in areas in which the franchise system has been instituted, and the claim of one route dealer who acquired his route from a terminated route dealer and who had not sought to purchase from The News. The Court dismissed the complaint of the route dealers who continued to receive copies of The News and who operated in areas in which the franchise system had not been instituted, and dismissed complaints of the remaining plaintiffs insofar as they were based on alleged violation of the Clayton Act and the Robinson-Patman Act.

All of the defendants appealed from the resulting judgment; the plaintiffs cross-appealed from the denial of the Robinson-Patman claims, and to the extent that the judgment did not afford the equitable relief requested by the plaintiffs in their proposed judgment, and only from such parts of the judgment (1343a-1344a).

The Second Circuit held that the franchise dealers were not wholesalers, in that the selling function, including advertising, sampling and solicitation of prospective home subscribers, was performed almost entirely by The News and by the franchise dealers rather than by the boys, and therefore the agreements between The News and its

franchise dealers were not agreements between wholesalers and wholesalers, holding that the agreements thus met the requirements of the McGuire Act and therefore did not violate the Sherman Act. While it affirmed the finding that The News combined with the franchise dealers in violation of Section 1 of the Sherman Act to prevent some plaintiffs from obtaining copies of The News, it reversed the District Court's findings that this and other activity amounted to a conspiracy to monopolize in violation of Section 2. It affirmed the dismissal of the plaintiffs' claims of violation of the Robinson-Patman Act. It held that no liability existed for injury caused by the introduction by The News of the franchise system, the lower home subscription prices resulting from that system, or The News termination of direct sales to independent route dealers because of its decision to substitute the franchise system, dismissing the claims of those plaintiffs to whom The News continued to sell, modifying the injunctive relief provisions of the District Court judgment accordingly.

Within the time permitted for filing a petition for rehearing, plaintiffs sought an extension of such time, which was granted by the Court below. A petition for rehearing was filed squarely raising the question, *inter alia*, of whether the Court had properly discharged its appellate function under Rule 52(a) of the Federal Rules of Appellate Procedure. On November 5, 1975, the Second Circuit denied the rehearing petition, and subsequently stayed the mandate of the Court pending determination of this petition for certiorari.

POINT I.

This Court should grant review to determine whether the Court below properly reversed the findings of the trial Court, without any ruling that such findings of the trial Court were clearly erroneous, when the findings of the trial Court were based upon uncontradicted testimony and concessions of the parties successfully seeking reversal, and when such factual findings were clearly supported by uncontradicted evidence supplied by the parties who sought reversal.

The trial Court found that the price fixing exemption of the Federal McGuire Act and its counterpart Feld-Crawford Act in New York did not protect The News in its agreements with its franchise dealers, since, of course, the McGuire Act exemption does not apply to contracts between wholesalers and wholesalers. And the trial Court found that The News was a wholesaler "within the normal and customary definition of 'wholesaler' as one whose business is the selling of goods in gross to retail dealers" (1281a). As we showed above in our statement of facts, counsel for The News conceded throughout that The News sold copies of the newspapers in bulk to the franchise dealers, who re-sold to the boys, with each boy in the franchise system selling between 20 to 30 copies of The Daily News and 45 to 50 Sunday editions to the ultimate consumers (745a). The testimony of the Circulation Director of The News, Underwood, its chief witness, completely confirmed that The News sold copies of the paper to the franchise dealers who in turn re-sold to the boys, who in turn sold to the ultimate consumer, with Underwood expressly denying that there were any occasions when The News sells directly to the carrier boy or to the ultimate consumer (see, *supra*, pp. 12-13).

Despite the uncontradicted admissions by counsel for The News, and despite the testimony of its witnesses as to the chain of title, the Second Circuit determined that The News was selling directly to the customers, that The News did not sell to the franchise dealers, that the franchise dealers did not sell to the boys, and that the boys did not sell to the home delivered customers, all flying in the face of the uncontradicted testimony of The News and the statements of its counsel, and all without any evidentiary support whatsoever.

This Court has not previously hesitated to review an antitrust decision of a Circuit Court to determine whether it had properly discharged its appellate function under Rule 52(a) under which the findings of the trial Court are not be be set aside unless clearly erroneous [e. g., *Zenith Radio Corp. v. Hazeltine*, 395 U. S. 100 (1969)]. We submit that in the case at bar, such review should be granted, for the decision below is in conflict with decisions of this Court and of other Courts of Appeal, as follows:

(a) Even if the evidence would have supported a conclusion either way as to whether the franchise dealers are wholesalers and the news boys retailers, a choice between two permissible views of the weight of the evidence would not be clearly erroneous, and hence not reversible. 338 U. S. 338 (1950). But the Court below went even further, and, as we show below at pages 26-29, made new findings as to which there was no evidentiary support whatsoever, ignoring clear evidence in the record contrary to what the Court below then found.

(b) The Court below failed to give the deference it must give to the decision of the trial judge [*Zenith*,

supra at 123], failing to give the plaintiffs "the benefit of all favorable inferences from the facts proved relative to the" issue [*Stacher v. United States*, 258 F. 2d 112, 116 (9th Cir. 1958)], though the Court "must take that view of the evidence most favorable to" the appellees. *Kansas City Stockyards Co. of Maine v. Anderson*, 119 F. 2d 91, 93 (8th Cir. 1952).

(c) The defendants never contradicted, and never introduced any evidence to contradict, the massive evidence that franchise dealers were wholesalers and the boys retailers. In the absence of such evidence, it is elementary that the Court below should have affirmed [*Stewart v. Lansing*, 104 U. S. 505, 511-2 (1881)], especially when all evidence tended to confirm this massive evidence, even though appellate counsel might have tried the case differently. *Metropolitan Broadcasting Corporation v. Lebowitz*, 293 F. 2d 524, 527 (D.C. Cir. 1961). Cf. *Shapleigh v. Mier*, 299 U. S. 468, 475 (1936).

(d) The Second Circuit improperly permitted the defendants to prevail upon contentions they had never raised in the District Court, in a matter as to which there was absolutely no dispute at trial. Moreover, its reversal was in conflict with the rule of the Circuit Court of Appeals for the District of Columbia, which has ruled that reversal is improper where, as here, an appellant not only failed to seek a finding at trial, but failed to object to a key finding, such as here, that the franchise dealers and news boys were respectively wholesalers and retailers. *Fleming v. Van Der Loo*, 160 F. 2d 906, 909-10 (D.C. Cir. 1947).

(e) Insofar as our research has been able to discover, for the first time a federal appellate Court has reversed findings which were totally supported by the admissions of appellants' counsel and the testimony of its witnesses, and worked a reversal based upon an argument of appellants that their testimony and their admissions should be disregarded. This cannot be done, for the admissions were binding. *Oscanyan v. Arms Co.*, 103 U. S. 261 (1880). "At all events, it does not lie in the mouth of a defendant in equity to complain that the court assumed his answer made under oath to be true and decreed accordingly." *Cavender v. Cavender*, 114 U. S. 464, 471 (1885). Yet the Court below permitted the defendants to complain that their uncontradicted testimony is not true. Cf. *Mercelis v. Wilson*, 235 U. S. 579, 583 (1950).

As nearly as we can ascertain, the Court below apparently disregarded the admissions of defense counsel on the theory that the significance of the admissions had not been realized. But at the time of trial, the case had been in the Courts for six years, ample time for defense to have familiarized itself with applicable law. *Oscanyan, supra,* held admissions by counsel binding where he had two days to prepare, could have requested an adjournment, and no new facts were set forth. Moreover, the trial court here noted that all counsel were fully familiar with the implications of the antitrust laws (297a), and defense counsel had repeatedly conceded that except for the harassment issue, there was no material dispute as to any of the facts (54a, 1038a). A rule such as that suggested by the Court below, that an honest admission by counsel familiar with the law, or even unfamiliar with the law, is to be disregarded, is totally novel

in our jurisprudential system, and should assuredly be reviewed by this Court.

(f) Moreover, by a reversal based upon evidence not contained in the record and totally contradictory to the trial contentions of the parties who prevailed on appeal, the Court below denied the plaintiffs due process of law, in that plaintiffs would have and could have introduced the following additional evidence at the trial, which had been considered at the time of trial wholly cumulative in the light of the trial record: (I) An advertisement by The News showing that the boys sold to the consumers, photocopy of which, in reduced size, is annexed hereto as Exhibit I; (II) that franchise dealers were wholesalers, in that they did sell, in addition to the news boys, copies of The News to motor route dealers; (III) that The News sold to other vendors in such a manner as to make The News a retailer under the rule of the opinion, making the agreements between The News and the franchise dealers (if they were retailers, as the Court below ruled) agreements between retailers and retailers, and the price-fixing agreements thus illegal.

In any event, as we suggested in our petition for rehearing, if it were correct, as the Court below held, that the selling function, including advertising, sampling and solicitation of prospective home subscribers, was performed almost entirely by The News and by the franchise dealers rather than by the boys, then The News and the franchise dealers were both retailers, and the price-fixing agreements between them would not have been protected by the McGuire Act, because they would have been agreements between retailers. This point was not raised until the petition for rehearing filed below, since even in the

Second Circuit the defendants had not taken the position that such selling functions were performed almost entirely by The News and the franchise dealers.

To a certain extent, the decision below apparently rested upon the tender age of the boys (App. B, *infra*, p. 72a). This ignored that New York law recognizes that boys of this age may engage in "*selling* and delivering newspapers • • • to customers at their homes or places of business." New York Education Law, §3228. (Emphasis supplied.) The United States also recognizes that boys may sell newspapers.[3]

In looking at what the Court below termed the substance of the relationships, the Court made many findings of fact *de novo*, contradicted by or inconsistent with the record.

Firstly, the Second Circuit found that the boys had "no real risk and no chance of realizing independent profits," noting an absence of evidence that boys had sustained losses on account of delinquent subscribers. But two franchise dealers had testified, as we noted, *supra*, pages 13-14, that, if a subscriber did not pay the boy, it was the boy's loss, under the system. This testimony was never contradicted.

Secondly, when the Court recited that the selling function was performed almost entirely by The News and the franchise dealers, this was plainly untrue. See, *supra*, pages 12-15.

[3] "The Bureau of Census Occupational Classification System in a recent revision of 52 of 441 occupational categories changed 'newsboys' to 'newspaper carriers and vendors.'" *American Newspaper Publishers Association Special Report: Handbook for Maintaining the Independent Contractor Status of Newspaper Carriers* (1974), page 5. (Emphasis supplied.)

Thirdly, the Court below relied upon the theory that "The boy hardly has a proprietary interest in the subscribers or his route," but this was untrue: If a boy "got orders off of his route, then it would be put on the kid's route, whatever street the kid delivers on" (751a). Development of new orders thus enlarged the boy's route. Moreover, The News itself represented to potential news boys that they would have their own route (Pl. Ex. 12, 191a-192a).

Fourthly, the Court below further based its finding of a lack of retail standing of the boys partly upon the alleged fact that "their profits remained limited to the established rate per delivered paper" (App. B, *infra*, p. 73a). But there never was such a rate. The profit of the boys depended upon the spread between the price at which they purchased from the franchise dealers and sold to the consumers (1100a, 1101a; Pl. Ex. 84, 1366a; 915a-916a). The only reason for any limitation of profits was that The News not only fixed the price at which the franchise dealers sold to the boy, but also fixed the price at which the boy sold to his customer (1140a), and never allowed any requested increase in the boy's profit (907a-908a). Moreover, in any event, a large portion of the boy's income came from tipping—not controlled by The News (867a).

The Court below further completely ignored the constant characterization by The News of what the boy earned as being his profit, the difference between his retail rate and the franchise dealers' wholesale rate. We have already referred, *supra*, page 13, to the form approved by The News and used by defendant Lepore so reporting, and we note further that many other franchise men used precisely the same language (859a-862a). The franchise dealer's profit—the difference between the wholesale rate to him and his wholesale rate to the boy—was deducted

from The News' subsidy to the franchise dealers (884a). The boys were told that they had to buy papers (907a), and the boy's eventual compensation was referred to constantly as his profit (908a). Though there were perhaps eight or nine phone solicitors for The News (930a), there were 5,000 boys operating as an automatic sales force (1137a), with phone solicitation occurring only after the boys had solicited (985a-6a).

The Court further noted that the franchise agreement did not require the use of the carrier boys at all, which was correct, but it failed to note that the entire franchise system depended on the use of the boys. As we noted above, *supra,* page 10, every route dealer who was invited by The News to become a franchise dealer was told in the letter of invitation that the system so required. Further, The News admitted that the franchise system was a boy system (1228a); route dealers and other prospective franchise dealers were told they had to use boys in the franchise system, and The News' counsel noted that the purpose of the franchise system was to establish a boy system. See, *supra,* pages 10-11.

Thus, for the first time in recent jurisprudential history, so far as our research has been able to determine, a Court of Appeals has found facts to exist directly *contra* to all the uncontradicted and uncontested testimony and concessions of the losing parties at the trial. Not only was there a failure to make any determination that the trial Court's findings were clearly erroneous, but the Court of Appeals recited "facts" which were directly contrary to what the trial showed. We submit that under these circumstances, there should be a review by this Court to determine whether the Second Circuit properly exercised its Rule 52(a) functions.

In yet another instance, the Court again ignored the plain facts of the case. Thus, in finding the refusal of The News to deal with plaintiffs not to be violative of the anti-trust laws on the basis that plaintiff route dealers were not terminated until they had first been offered an opportunity to become franchise dealers, the Court below wrote that "If they accepted [this opportunity to become franchise dealers], it was anticipated that they would sell their independent routes to others, not they would deprive competing papers of an outlet" (App. B, *infra,* p. 79a). However, the Second Circuit to the contrary notwithstanding, there was no such testimony as to such anticipation. On the contrary, as we noted in our statement of facts, the plaintiffs were merely told that they would have to give up other papers, or dispose of them, while the two plaintiffs who stated that they wanted to sell their routes were told by The News that there was no time to do so (*supra,* p. 11).

Of course, the McGuire Act is no longer law. But we submit that this should not be a consideration militating against the grant of certiorari here, since the question we bring for review is whether an appellate court has properly exercised its Rule 52(a) functions, the importance of which question is not negatived in the least by the fact that the legislation upon which it relied has since been repealed.

Additionally, we note that the decision below is in conflict with that of the Ninth Circuit in *Blankenship v. Hearst Corporation,* 519 F. 2d 418 (9th Cir. 1975), which treated carriers as bona fide purchasers and resellers.

• • •

The failure of the Court below to properly discharge its appellate function is perhaps explainable by its hostility to the majority opinion of this Court in *Albrecht v. Herald Co.,* 390 U. S. 145 (1968), which held maximum

price-fixing (as here) to be as restrictive of competition as minimum price-fixing. For the Court below held that limitations on maximum resale prices are less restrictive of competition than minimum price restraints, citing the *dissenting* opinion in *Albrecht* (App. B, *infra*, p. 68a). This ruling below is thus in a way in conflict with this Court's decision in *Albrecht*, and the conflict may have been the (subconscious) motivating force in the Rule 52(a) violation below.

POINT II.

This Court should grant review to determine whether the Court below denied plaintiffs an opportunity for a hearing on the question of whether the aggregate of The News' restraints on trade—price fixing, termination of route dealers, boycott, territorial and customer restrictions, price and other discriminations, and failure to make available copies of The News in varying localities—amounted to an unreasonable restraint of trade.

Since the trial Court found *per se* price fixing violations, and illegality in the customer and territorial restrictions of the franchise system, it never reached the question of whether The News franchise system constituted an unreasonable restraint of trade, as had been argued at length in the post-trial brief filed with the trial Court (pp. 49-77). The Second Circuit, by reversing the findings of *per se* violations, without any remand for a trial or a finding on the issue of whether there had been any unreasonable restraint of trade, denied plaintiffs an opportunity for a judicial determination of the question, and they were thus deprived of a right to a hearing, and of property, without due process of law in violation of the Fifth Amendment. The attention of the Second Circuit was called to this in the plaintiffs' petition for rehearing (pp. 1-2).

Had the Court below found that the institution of the franchise system and termination of some plaintiffs was not an unreasonable restraint—or if it so found *sub silentio*—its decision would be in conflict with of the Ninth Circuit in *Noble v. McClatchy Newspapers,* F. 2d (9th Cir. 1975), 1975-2 Trade Cases ¶60,594. Elimination of distributors pursuant to a program may be an unreasonable restraint of trade when, as here, there was an effort to establish market dominance or extend a natural monopoly of the manufacturer's own product, or other restrictive trade practices. *Industrial Bldg. Materials, Inc., v. Interchemical Corp.,* 437 F. 2d 1336, 1343, fn. 8 (9th Cir. 1970). Cf. *American Motor Ins, Inc., v. Holiday Inns, Inc.,* 52 F. 2d 1230 (3rd Cir. 1975).

POINT III.

Since newspapers are unique rather than fungible items, and are protected by the First Amendment, price fixing was illegal *per se* under the McGuire Act because The News was not in free and open competition with commodities of the same general class.

The trial Court found, and the Second Circuit affirmed, that The News is in free and open competition with The New York Times and other local newspapers in the suburban area. However, we believe that this Court should review this decision, especially since the decision below is in a way in conflict with Mr. Justice Frankfurter's concurring opinion in *Associated Press v. United States,* 326 U. S. 1, 27-28 (1945), where he ruled that newspapers

are not wares like peanuts or potatoes, and that therefore "the incidence of restraints upon the promotion of truth through denial of access to the basis for understanding calls into play considerations very different from comparable restraints in a cooperative enterprise having merely a commercial aspect. • • • The interest of the public is to have the flow of news not trammelled by the combined self-interest of those who enjoy a unique constitution position precisely because of the public dependence on a free press."

Serious questions are raised by the treatment below of different newspapers as interchangeable commodities. To the reader or subscriber, different newspapers are not so fungible:—The Daily News sells for 15¢, The Times for 20¢, The Sunday News for 30¢, The Sunday Times for 60¢—and if these newspapers are to be treated as peanuts or potatoes, then it is plain that The New York Times should have been driven out of business long, long ago. Such great newspapers as The New York News and The New York Times are simply not of the same general class, nor are either of them in the same general class as local newspapers. To lump them all together in one general class is to do violence to the very diversity of newspapers fostered by the First Amendment.

The contents of different newspapers are unique. Quite apart from the vast differences in editorial policy between The News and The Times, quite apart from The News' attempting to simplify stories so as to make them more understandable while The Times gives thorough background information, The News emphasizes photographs (958a-959a). The News is a tabloid, unlike The Times and The Wall Street Journal (959a-960a); The News has columnists who do not appear elsewhere in the city press (961a), and is the only morning newspaper (except the

local Staten Island Advance) with comic strips (960a-961a).

The Times and The News may no more be considered competing commodities of the same general class than beer and Coca-Cola could be so considered, because both are beverages and a person desiring to quench his thirst must choose which to buy. Cf. *Eastman Kodak v. Federal Trade Commission,* 158 F. 2d 592 (2nd Cir. 1946), cert. den. 330 U. S. 828 (1947).

POINT IV.

This Court should grant review to determine a conflict in decisions of Courts of Appeals, and with this Court, as to standing of plaintiffs to assert illegality of the customer and territorial restrictions of The News' franchise agreements. The plaintiffs here had the requisite standing because they were injured by the restrictions.

In the last page of its opinion, the Court of Appeals modified the trial court's judgment by eliminating the injunctive provisions against both the customer and territorial restriction provisions of The News' franchise agreements. The Court firstly disposed of the territorial restrictions on the theory that by virtue of the exclusive territory provisions of the agreements, the independent route dealers "are assured of facing competition from no more than one franchise dealer, who is confined to a certain area" (App. B, *infra,* p. 80a). In so ruling, the Court flew in the face of the record, since, without record support, it assumed a non-existent territorial congruity between a franchise dealer and a route dealer, when in fact, the testimony was that there were several franchise dealers at the same time in most route dealer's areas

(610a). Thus, plaintiff Markowitz had five to seven franchise dealers in his area at the same time (114a); plaintiff Rosenblum two-four (350a-351a); plaintiff Fox two or three (327a, 331a); plaintiff Davis three (502a); plaintiffs Cartabuke, Perrot, and Amato each had two (575a-576a; 649a; 759a); while plaintiff Hand had several (610a).

As to the customer restrictions of the franchise agreements, which prohibited resale except to news boys, the Court below, though apparently ruling that plaintiffs had standing to attack this restriction (App. B, *infra*, p. 81a). nonetheless eliminated the injunctive prohibition against this restriction (App. B, *infra*, p. 88a) on the theory that, whether this restriction standing alone would be illegal was rendered academic because of the conspiracy between The News and franchise dealers to prevent the independent route dealers from obtaining copies of The News for distribution. However, the question was by no means rendered academic, since the customer restrictions still persist in the cases of plaintiff route dealers who, though their complaints have now been dismissed because they were not the victims of such conspiracy, still find nonetheless that they cannot purchase copies of The News from franchise dealers. They might well be able to purchase such copies at prices more favorable than at which they presently buy, and indeed one franchise dealer, Lepore, had suggested below that he would willingly set up a distribution system under which he would sell copies of The News to route dealers. By striking the provisions of the injunction issued by the District Court which prohibited customer restrictions, the Court below, though stating that the point is academic, has actually legitimized the customer restrictions, which are of course illegal under the antitrust laws.

But perhaps more importantly, from this Court's point of view, the test for standing of the Second Circuit below, essentially a restatement of its "target area" test (*Calderone Enterprises Corp. v. United Artists Theatre Circuit*, 454 F. 2d 1292, 1295, 1296 (2nd Cir. 1971), cert. den. 406 U. S. 930 (1972), is one which would seem to be in a way in conflict with the decisions of this Court. This Court has historically taken a broad view of standing under the antitrust laws, and has never adopted or endorsed any of the restrictive tests laid down by the lower Courts. See *Hawaii v. Standard Oil of California*, 405 U. S. 251, 262, n. 14 (1972), where the Court lists several lower court cases with no more than a general comment acknowledging their restrictive approach. And in *Mandeville Island Farms, Inc., v. American Crystal Sugar Co.*, 334 U. S. 219, 236 (1948), the Court permitted a suit by growers alleging monopolization by refiners of a local sugar beet market and wrote:

> "The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers • • • [but protects] *all* who are made victims of the forbidden practices by whomever they may be perpetuated." (Emphasis added.)

This Court confirmed this position in *Radovich v. National Football League*, 352 U. S. 445, 454 (1957), a suit by a professional football player claiming a boycott by teams, and supported its holding by pointing to Congressional support for private antitrust enforcement which it found in the prima facie weight accorded by Congress, in Section 5 of the Clayton Act, 15 U. S. C. §16, to final judgments in a Government suit when used by private litigants. The Court concluded:

> "In the face of such a policy this Court should not add requirements to burden the private litigant

> beyond what is specifically set forth by Congress in [the antitrust] laws."

Moreover, the "target area" test of the Court below is in conflict with the test of the Ninth Circuit. Thus, in *In re Multidistrict Vehicle Air Pollution M. D. L. No. 31,* 481 F. 2d 122, 128 (9th Cir. 1973), cert. den. 414 U. S. 1045 (1973), the Ninth Circuit formulated its test as follows, at 128:

> "To attain standing, a plaintiff must thus allege that the antitrust violation injured a commercial enterprise of the plaintiff in the area of the economy in which the elimination of competition occurred. Standing is denied, on the other hand, if the claimant's commercial activity occurred outside that area of the economy."

It needs no argument to demonstrate that plaintiffs here are well within the Ninth Circuit test.

The illegality of the customer and territorial restrictions are clear from the decision of this Court in *United States v. Arnold, Schwinn & Co.,* 388 U. S. 365, 378 (1967), since under the franchise agreements, the manufacturer parted with dominion over his product, and transferred risk of loss to another (the franchise dealer), and therefore could not reserve control over its destiny or the conditions of resale (*id.* at 379) (1294a). The franchise dealers had no right to return any copies of The News, so that title had been parted with; The News transferred risk or loss, for the risk of selling or not was wholly that of the franchise dealer. The News parted with dominion, for it was up to the franchise dealer to select and supervise the boys to whom he would in turn re-sell. Yet The News did reserve control over the destiny of copies of the papers, since under the franchise agreement they could only be resold to news boy carriers, and by news

boy carriers to ultimate consumers, at prices stipulated by The News. Such horizontal arrangements for customer and territorial restraints are per se violations of the antitrust laws. *United States v. Topco Associates, Inc.,* 405 U. S. 596 (1972).

The decision below, permitting the franchise system and its restraints to operate to the disadvantage of independent route dealers, is squarely in conflict with the recent decision of the Ninth Circuit in *Noble v. McClatchy Newspapers, supra,* page 31, where the Ninth Circuit ruled, 1975-2 Trade Cases at page 67,634:

> "Because of such advantages to manufacturers, independent distributors continue to survive, and bring to the public the benefits of added competition in the distribution of goods and services. These benefits would be lost if manufacturers could obtain the private economic benefits of a system of distribution through independent businessmen, and at the same time restrict the freedom of such independent businessmen to compete. It was to prevent the wholesale destruction of this opportunity for competition that *Schwinn* forbade manufacturers to control the disposition of products after sale. 'To permit this would sanction franchising and confinement of distribution as the ordinary instead of the unusual method which may be permissible in an appropriate and impelling competitive setting, since most merchandise is distributed by means of purchase and sale.' 388 U. S. at 379."

And the effect of the decision below is to sanction franchising and confinement of distribution as the ordinary method; thus, the decision below was still in another way in conflict with this Court's decision in *Schwinn.*

In any event, the territorial limitations should have fallen under the standard of reasonableness, because of the anti-competitive effects of the franchise system, including

the territorial limitations, which we documented, *supra*, at pages 15-18. When a route dealer went out of business, not only were copies of The News not delivered in that area for considerable time, but there was a lack of home delivery of all other newspapers—which still continues in some areas. Had there been no territorial restrictions of the franchise dealers, the franchise dealer from one area might have serviced at least other areas with copies of The News, and might have sold copies of The News to terminated route dealers outside his area. Moreover, as the trial Court had noted, the exclusivity of the territory insured that "• • • each dealer would concentrate on taking business away from The News' competitors rather than from his fellow franchise dealers" (1293a, n. 45).

Indeed, franchise dealers had sold copies of The News to terminated route dealers, until this violation of the franchise agreement was stopped by The News (e. g., 540a-544a).

The territorial and customer restrictions are clearly illegal; plaintiffs have been injured by them; they should not be allowed to stand.

POINT V.

This Court should finally determine an important issue: whether intent to monopolize is a prerequisite for a conspiracy to monopolize under Section 2 of the Sherman Act. In any event, the findings of the Courts below that such intent was not shown here were clearly erroneous, and should be reversed.

The Court below ruled that it was necessary to demonstrate an intent to monopolize the designated segment of

commerce here—intrabrand competition in the home delivery market—before sustaining a Sherman Act Section 2 conspiracy. The Court below thus, for the first time, imported the requirement of intent—previously required only in attempt, not conspiracy, cases—into conspiracy cases, and reversed the trial Court's finding of such a conspiracy. We believe that this novel and substantial doctrine of law—inconsistent with this Court's dictum in *Nash v. United States*, 229 U. S. 373, 378 (1913)—should be reviewed by this Court. See also, App. A, *infra*, pages 46a-48a.

The trial Court had found that there was no such specific intent to monopolize, but that its absence was irrelevant;[*] the Court of Appeals found the absence of intent fatal, and reversed the Section 2 conspiracy finding, while affirming the finding of the absence of intent. Both Courts below thus made clearly erroneous findings, for the evidence of intent to monopolize, much of which was ignored by both Courts in their opinions, was overwhelming.

The Court of Appeals apparently attempted to justify The News' adoption of the franchise system on the theory that it had not been doing well in circulation on Long Island (Nassau and Suffolk Counties) despite initiation of specialized suburban zone sections—but this finding not only was not supported by any evidence, but also contradicted the record which showed that the Long Island Edition of The News first appeared when the franchise

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[*]The trial Court did not clearly find that there was an absence of intent, but only that this was not the *primary* intent. Said the Court, App. A, *infra*, at page 46a:

> "In any event, plaintiffs have failed to prove that The News had the requisite specific intent to monopolize. Notwithstanding the predatory nature of many of its acts, I am convinced that its *primary* concern was not the elimination of its competitors." (Emphasis supplied.)

system became operational on or about January 10, 1966 (255a-256a). Moreover, as we showed above (p. 8), The News did practically nothing to develop home delivery there prior to 1963, first had a home delivery circulation department in 1964, and prior to the adoption of the franchise system only engaged in occasional samplings and telephone solicitation, not even paying route dealers as promised.

There can be no explanation of The News' adoption of the franchise program except an intent to monopolize. Absent such intent, why did The News embark upon the program without cost studies? Absent such intent, why did it choose to gain expanded sales through what its later cost studies showed to be the more expensive franchise system, instead of giving the less expensive route dealer system a chance? Why, indeed, did it choose to expand sales when such expanded sales would have created net losses of ever-increasing hundreds of thousands of dollars? Why had The News not had a long Island Edition prior to the franchise program, and why had it neglected home delivery?

Again, if The News had no predatory motive, why did it refuse permission to route dealers to sell their routes if they were to become franchise dealers? Why did it stop supplying route dealers who were selling copies of The News, and thus making money for The News, especially in areas not yet covered by franchise dealers?

Thus, the inescapable conclusion is that The News acted completely "insanely" (to use the words of its parent company's circulation manager at 994a-995a), or else with predatory motive. The latter is obviously the reason. There could only have been one motive, for there is no other explanation of why The News felt

compelled to lose several million dollars: that by destroying or severely injuring the independent route dealer system, a system of home delivery available to present publishers and to any new publisher without any cost whatsoever, The News could not only foreclose the possibility of a new publisher of a morning paper appearing, who would have to invest in setting up his own home delivery system, but could restrict home delivery of its "competitiors," as happened here (*supra*, pp.15-18).

This kind of a motive, predatory though it is, is not novel. Thus, in an article "Antitrust Problems in The Newspaper Industry," 82 Harvard Law Review 319, 326 (1968), the following appears:

> "Newspapers naturally prefer to have distributors whose zeal in obtaining subscriptions they can depend on. On the other hand, in a market with two or more newspapers, having separate distributors for each is highly inefficient. More important for purposes of antitrust law, exclusive distributorships seriously impede new entry, since they require each new paper to build its own system. In addition to requiring additional capital and personnel, the creation of a new distribution system may take more time than a new entrant can easily afford. Indeed, the most likely explanation why newspapers have overlooked the use of multipaper carriers in the past is a desire to block new entry."

But be that as it may, the net effect upon competition has been horrendous. Defendant's Exhibit F (1405a) shows the number of carriers, including franchise dealers and independents, while Defendant's Exhibit I (1411a) shows merely the number of franchise dealers. In 1965, according to Defendant's Exhibit F there were 125 carriers, all of whom, of course, would have been independent route dealers. In 1972, the total number of carriers, accord-

ing to Defendant's Exhibit F, went to 133, of which, according to Defendant's Exhibit I, 97 were franchise dealers, meaning that there were 36 independent route dealers in Nassau left out of the 125 route dealers existing in 1965. Of the 34 route dealers in Suffolk County existing in 1965 (Defendant's Exhibit F) there were only two left in 1972, since Defendant's Exhibit I shows that there were 50 franchise dealers in Suffolk County in 1972 as against a total of 52 carriers shown in Defendant's Exhibit F for 1972.

The intent to monopolize seems clear,[5] and it is clear also that price-fixing was a part of that conspiracy as well. This Court should grant review, determine whether intent must be proved, and, if it should rule that intent must be proved, reverse the findings below as clearly erroneous.

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[5]The Court below found that The News did extensive sampling under the franchise system (App. B, *infra*, p. 73a). There is no record support for this finding, and it is *contra* to the record (*supra*, p. 15). But the decision below is in conflict with *Morning Pioneer, Inc., v. Bismarck Tribune Company*, 493 F. 2d 383 (8th Cir. 1974), which held an intent to monopolize was sufficiently shown by distribution of thousands of free newspapers. Here, in any event, The News did provide hundreds of thousands of sample free papers for the 5,000 news boys to give away, and thus, despite the erroneous finding that The News did the sampling, such sampling was enough to establish intent under the Eighth Circuit rule.

POINT VI.

This Court should grant review of the denial of plaintiffs' Robinson-Patman claims involving price and other discriminations, to determine whether, when the components of the article in question have passed through interstate commerce, discrimination is permissible simply because the finished article itself (the newspaper) is not the subject of price discrimination in actual interstate sales.

Both the trial Court and the appellate Court rejected our argument that price and time of delivery discrimination—prices of The News to its franchise dealers, and the delivery times, both being much more favorable than to the route dealers—were violative of Robinson-Patman, because we did not show that the transactions generated discriminations across state lines. The Court below relied upon this Court's decision in *Gulf Oil Corp. v. Copp Paving Co.*, 419 U. S. 186, 200 (1974). As we read that case, however, it leaves open the question of whether there may be price discrimination, even in purely intrastate sales, when the component parts of the merchandise being sold had themselves passed through interstate commerce. Here it was stipulated (Court's Exhibit 1), that the news which The News received, the newsprint and ink used, the articles it featured, etc., were all part of interstate commerce. There need be no extended discussion here, since certainly this Court knows its mind better than the undersigned could ever divine it.

We do pause to note, however, that only subsection (a) of 15 U. S. C. 13 contains the requirement that the purchases be "in commerce," while the price discrimination—partly in the form of lower prices to the franchise, partly in the form of subsidization to them—and discrimina-

tion in time of delivery would seem to be prohibited under subsections (d), (e) and (f), which do not contain any requirement that the purchase be "in commerce."

We also note that the franchise system was expanded in 1967 to other counties in New York City, and in New Jersey (968a-969a).

CONCLUSION.

This Court should grant review of the decision below.

Respectfully submitted,

HERBERT MONTE LEVY,
Attorney for Petitioners.

LET HIS FEET DO THE WALKING FOR YOU.

Whose feet are they? They belong to the young man who delivered your free copy of The News this morning.

These fast-moving feet can save you needless steps—and precious time—every morning by trotting The News up to your front door in time for breakfast.

Weekly home delivery rates are low . . . only 90c for service seven days a week, 60c for delivery Monday through Saturday, and 30c for the Sunday News.* Your own steps and time are worth much more than that.

Later this week your newspaper boy will step up and ask you for your order . . . don't be surprised if he does a little dance when you say "yes."

Or you can place your order for early morning home delivery now, by calling one of the numbers listed below.

New Jersey: 798-9407 Suffolk: 543-4141
The Bronx & Staten Island: 458-9556
Nassau: 433-1220 Brooklyn & Queens: 458-0320

* There is a small service charge in motor route areas of Long Island.

THE NEWS
NEW YORK'S PICTURE NEWSPAPER

New York's Number 1 Best Seller

APPENDIX.

APPENDIX A.

1256a

Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

67 Civ. 1030

CHARLES W. BOWEN, JR., *et al.*,

Plaintiffs,

v.

THE NEWS, *et al.*,

Defendants.

APPEARANCES:

HERBERT MONTE LEVY, ESQ.,
Attorney for Plaintiffs

NICHOLAS L. COCH, ESQ.,
Attorney for Defendants Michael Lepore and Victore Lepore

TOWNLEY, UPDIKE, CARTER & RODGERS, ESQS.,
Attorneys for other Defendants (Andrew L. Hughes, Esq., Ronald S. Daniels, Esq., John M. Callagy, Esq., of counsel)

BAUMAN, D.J.

This is an action by thirty independent home delivery dealers[1] of The Daily News and the Sunday News against New York News, Inc ("The News"), the publisher of those newspapers, and various of its employees and franchise dealers for treble damages and injunctive relief under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26.

[1] Plaintiff Robert C. Harding withdrew from this action on May 22, 1972 (Tr. 1916-17).

The request for relief is based upon alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2; Section 3 of the Clayton Act, 15 U.S.C. § 14; and Sections 2(a), 2(c), 2(d), 2(e) and 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §§ 13(a), (c), (d), (e) and (f). At issue is the effort of The News to change its home delivery system from one employing independent route dealers to one utilizing carrier boys operating in conjunction with "franchised dealers."[2]

I.

In order to understand the exact nature of the alleged antitrust violations set forth in the complaint, it is necessary to describe in some detail the parties to this action and their relationships with each other.

The News is a New York corporation engaged in the business of publishing and distributing the "Daily News" and "Sunday News", newspapers published in New York City and generally distributed in the New York metropolitan area and, to a lesser extent, in the United States

[2] The changeover was part of an effort by The News to obtain greater control over the resale price and method of distribution of its paper.

The route dealers purchased newspapers from The News (at wholesale prices) and delivered them to their customers by use of automobile. However, since the routedealers also distributed competing newspapers, The News was not in a position to dictate the home delivered price of its newspaper.

For reasons which will appear later in the opinion, The News felt that this limitation seriously impaired its ability to compete in the home delivery market. It decided therefore to institute its own home delivery system and structured it around independent contractors which it designated "franchise dealers". These franchise dealers agreed to deal only in The News and to purchase quantities of The News in bulk for resale to carrier boys at prices fixed by The News. The carrier boys, in turn, resold to the public "at no more than the regularly assigned home delivered price."

and foreign countries. At the time of this lawsuit, its circulation was approximately 2,000,000 papers daily and 3,000,000 on Sunday, the largest of any newspaper in the United States.

The News concedes, as well it might, that it is engaged in interstate commerce within the meaning of the Sherman and Clayton Acts. It is undisputed that it carries local, state, national and international news, including sports, nationally known columnists, comics and other syndicated features. Its enormous advertising content includes the messages of industrial giants from every corner of the United States.

The remaining defendants are either present or former News employees or present or former franchise dealers.[3]

The plaintiffs are, or were, independent route dealers dealing in a number of newspapers, periodicals and

[3] Aside from The News itself, the first eight named individual defendants in the amended caption (Ct. Ex. 2) are present or former News employees.

Jack Underwood was Circulation Manager of The News from October, 1964 to June, 1970, and is presently Director of Circulation.

Robert O'Sullivan was Home Delivery Area Supervisor for The News from March, 1968 to July, 1969, and is presently the Manager of The News' Brooklyn plant.

Anthony Catanzaro was Assistant Suburban Area Sales Manager from February, 1966 to November, 1966, and is presently Assistant Circulation Sales Manager for Home Delivery.

David Auerbach has been a Circulation Sales Representative since October, 1962.

Donald A. Nizen was Suburban Area Sales Manager from May, 1964 to May, 1967, and is no longer employed by The News.

Gabriel Lewander was Circulation Sales Manager from January, 1970 to December, 1970, and is no longer employed by The News.

F. M. Flynn was President of The News from May, 1947 to May, 1970, and is currently Chairman of the Board of the Corporation and Publisher of The News.

W. H. James was Executive Vice President of The News from April, 1965 to May, 1970, and is currently its President.

The remaining defendants are or have been franchise dealers.

special interest publications. In general, they purchase these items from wholesalers and resell them to home delivery subscribers in defined territories.[4] Because each confines his activities to his own territory, the routes have become more or less valuable and salable.

Prior to 1965, The News was home delivered exclusively by such route dealers. However, owing to circumstances to be related, The News became dissatisfied with its growth of home delivery circulation and decided to test a new distribution system in certain areas of the suburban metropolitan area, principally in Nassau and Suffolk Counties, using carrier boys who would buy their papers from franchised dealers. At the same time, it continued to deal with many of the route dealers in the time honored way. For this reason, the plaintiffs in this action fall into four separate categories.

(1) Route dealers to whom The News terminated sales on or after Jnuary 10, 1966;[5]

(2) Route dealers who continue to receive copies of The News and who operate in areas in which the franchise system has not been instituted;[6]

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[4] This exclusivity had its genesis in horizontal arrangements of doubtful legality prepared in the "Danby office." This office, which represented all the major newspapers published in New York City, was authorized to award exclusive territories for the home delivery of all member newspapers; and most of the plaintiffs purchased their routes with its written approval. Since the demise of the "Danby office", the route dealers have continued to respect these boundaries.

[5] Plaintiffs *Bowen, Cartabuke, Ditta & Failla, Davis, Goldberg, Gullo, Markowitz, Mirro, Poserow, Rosenblum, Schulz, Sweeney, Kahrs, Floral Park News Delivery Inc. (Gold), Amato,* and *Perrot.*

[6] Plaintiffs *Freilich, Marston, Rosenblatt, Theall, Salant, Silverstein, Cestaro,* and *Ellis.* Plaintiffs Ellis, Marston, and Silverstein have sold their routes, but received copies of The News during the entire time they operated them.

(3) Route dealers who continue to receive copies of The News and who operate in areas in which the franchise system has been instituted;[7]

(4) One route dealer who acquired his route from a terminated route dealer and who never sought to purchase from The News.[8]

The application of the legal theories advanced by the plaintiffs vary with respect to each of these categories and this difference will be noted as each of the theories is discussed.

II.

In the early 1960's, The News' circulation in New York City began to decline largely because of the fall off in sales of its evening edition which eventuated from the increasing popularity of television and the decreasing number of retail outlets remaining open in the evening. At the same time, the suburban explosion was creating a burgeoning market for newspaper sales which coincided with a similar shift of commercial enterprises from the city to the suburbs and their evolution as prime advertising markets. Since the bulk of The News' revenues comes from advertising, its appetite for its share was, quite naturally, whetted.

To this end, it attempted to compete with regional and local newspapers for circulation and advertising by publish-

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[7] Plaintiffs *Huntington News Delivery, Inc. (Hand), Shank, Fox, Greenberg,* and *Holman.* Plaintiff Fox has sold his route, but received copies of The News during the entire time he operated it.

[8] Plaintiff *Rathsam.*

ing a number of suburban or zone sections, each of which was and is distributed as part of The News in a specific geographic area. These suburban sections, which carry area news, also carry local advertising at lower rates than are charged for the full run of the paper.

However, under the route dealer system, The News' campaign was something less than successful. While the population of Nassau and Suffolk Counties rose by approximately 350,000 between 1960 and 1966 (Defendants' Exhibit T), The News' home delivered circulation in that area increased by only 2,383 copies (Defendants' Exhibit F). At the same time, Newsday's home delivered circulation increased dramatically as did that of the Long Island Press.

The News decided that its failure resulted from the disinterest of route dealers and hired Jack Underwood to develop a new distribution system.

In 1965 he instituted a pilot franchise dealer program in an area of Nassau County not then being serviced by a route dealer. This was so successful that it became the model for The News' new distribution system which was then expanded into certain parts of New York City and almost throughout Long Island. The franchise dealers who participated in the program were signed to contracts, the relevant provisions of which are:

(1) that The News agrees to assign an exclusive territory to the dealer;

(2) that the dealer agrees to purchase all newspapers required by home delivery customers at prices fixed by The News and supervise the delivery of them "at no more than the regularly assigned home delivery price";

(3) that the dealer agrees not to sell or distribute copies of any other newspaper, or any advertising material not authorized by The News;

(4) that the dealer agrees not to charge any carrier boy engaged in making deliveries and collections more than the price established therefor by The News;

(5) that the dealer does not have the right to return unsold copies of The News;

(6) that The News may terminate the agreement without advance notice if the dealer breaches any of its provisions; but that the dealer must give sixty days' notice in writing; and

(7) that the dealer "is and shall remain an independent contractor and not an employee or agent of The News."

In late 1965 and early 1966, a number of the plaintiffs were contacted by letter or telephone and offered the opportunity to become franchise dealers.[9] Those who responded

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[9] E.g. Bowen, Jaycox, Ditta & Failla, Gold, Fox, Goldberg, Gullo, Kahrs, Markowitz, Perrot, Rosenblum, Sweeney, Poserow, Schulz.

The letter read:

"The News plans to expand its Franchise Home Delivery operation in certain areas of New York City and Long Island. It has been proven that this type of Home Delivery is productive and beneficial to the publisher and that it insures a steady, healthy growth in circulation.

In order to accomplish this task, The News is seeking the services of qualified men to supervise the boy delivered franchise districts. If you are interested in joining the team as a full time exclusive News Franchise Manager, please telephone Mr. D.A. Nizen MU 2-1234 ex. 8046 of the News Suburban Circulation Sales Department.

An appointment for an interview will be arranged at the earliest possible convenience. Please respond promptly since our selections of Franchise Managers will be made within the next few weeks.

Sincerely,
Gabriel Lewander"

(Plaintiffs' Exhibits 23 [letter to Schulz]; 30 [letter to Fox]; 37 [letter to Goldberg]; 47 [letter to Poserow]; 75 [letter to Shank]).

were told that if they did not agree to adhere to all of the provisions of the franchise agreement their supplies of The News would be cut off. None of them was willing to bow to its restrictive terms and, within time, each was notified by letter or otherwise that The News would no longer deal with him.[10] In all, sixteen plaintiffs were cut off.[11]

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[10] The letters read:

"The News has decided to institute an independent franchise home delivery system in the area in which you now serve. The franchised home delivery carrier will handle the Daily and Sunday News on an exclusive basis.

Therefore, we must advise you that effective on ....., sales to you of the Daily and Sunday News will be discontinued.

Very truly yours,

NEWS SYNDICATE CO., INC.
By
Gabriel Lewander"

(Plaintiffs' Exhibits 6 [letter to Markowitz]; 25 [letter to Schulz]; 27 [letter to Kahrs]; 35 [letter to Rosenblum]; 38 [letter to Goldberg]; 40 [letter to Bowen]; 48 [letter to Poserow]; 54 [letter to Davis]; 56 [letter to Ditta]; 59 [letter to Cartabuke]; 60 [letter to Gold]; 63 [letter to Mirro]; 65 [letter to Perrot]; 74 [letter to Amato]).

[11] The following plaintiffs were cut off on the dates set forth below:

Plaintiff	*Date of Termination*	*Date of Notice*
Ditta & Failla	January 10, 1966	December 25, 1965
Markowitz	January 10, 1966	December 27, 1965
Perrot	January 10, 1966	December 25, 1965
Sweeney	January 10, 1966	*None*
Schulz	February 14, 1966	January 31, 1966
Bowen	February 28, 1966	February 16, 1966
Kahrs	May 9, 1966	April 22, 1966
Mirro	May 9, 1966	April 22, 1966
Goldberg	June 13, 1966	June 1, 1966
Poserow	July 4, 1966	June 20, 1966
Davis	July 24, 1966	July 11, 1966
Gullo	July 24, 1966	*None*
Rosenblum	October 31, 1966	October 17, 1966
Cartabuke	December 5, 1966	November 25, 1966
Gold	May 12, 1968	April 26, 1968
Amato	July 26, 1971	July 7, 1971

In the meantime, The News continued to recruit franchise dealers who were subsidized to help them through the early organizational phase of their operation and were charged less for The News than the route dealers who had not been terminated.

The eliminated route dealers attempted to buy copies of the paper from local newsdealers, but, with rare exception, found no one in Nassau or Suffolk willing to cooperate with them. As a result, they were forced to travel great distances and pay close to cover price to obtain its early editions. However, when franchise dealers complained that they were still facing competition from the "cut off" route dealers, defendants O'Sullivan and Cantanzaro directed them to ascertain the sources of the route dealers' supplies and promised that they would be eliminated. This precipitated a relentless campaign by the franchise dealers to learn the route dealers' sources of supply in which News employees enlisted and, as a result of which, the route dealers were under constant surveillance by franchise dealers, employees of The News and off-duty policemen recruited for this purpose. In some instances, the policing activities of the defendants turned into sheer harassment. Thus, when plaintiff Markowitz was observed removing papers from a drug store, The News had him arrested despite the fact that he claimed he had a written contract with the owner, one Max Seltzer, which authorized him to do so. When Seltzer was asked by defendant Auerbach to prosecute Markowitz, he confirmed Markowitz' story. He was told that if he did not agree to press charges The News would no longer supply him with papers. Seltzer refused and was cut off the next day.

III.

Plaintiffs contend that (1) The News' franchise agreement is an illegal price fixing agreement and that sales to them were discontinued in furtherance thereof; (2) the defendants have combined, in violation of Section 1 of the Sherman Act, to exclude them from access to copies of The News; (3) the franchise agreement contains illegal territorial and customer restrictions; (4) The News has attempted to monopolize the newspaper home delivery market; (5) the defendants have conspired to monopolize a part of the newspaper home delivery market; (6) the exclusive dealing provision of the franchise agreement violates Section 3 of the Clayton Act; and (7) The News violated the Robinson-Patman Act by discriminating in prices between different purchasers of The News.

IV.

THE NEWS' RETAIL PRICE MAINTENANCE AGREEMENTS ARE NOT EXEMPTED FROM THE ANTITRUST LAWS BY THE FAIR TRADE ACTS.

The News relies heavily in its defense on ¶ 2 of the McGuire Act, 15 U.S.C. § 45(a)(2)[12] and the New York Feld-Crawford Act, N.Y. Gen. Bus. L. § 369-a et seq.[13] It contends that these provisions permit it to fix the maximum resale price of its papers without violating the antitrust laws. Plaintiffs, on the other hand, vigorously oppose this reading of these two statutes and have advanced four reasons for the proposition that they do not exempt the defendants' conduct from § 1 of the Sherman Act.

In order properly to evaluate these competing positions, some preliminary, perhaps elementary, observations are necessary. The Sherman Act, as originally drawn, forbade

[12] See footnote 16 infra.
[13] See footnote 29 infra.

resale price maintenance contracts whether horizontal or vertical, see e.g., *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707 (1943); *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927); *United States* v. *Socony-Vacuum Co.*, 310 U.S. 150 (1940); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911).

The Miller-Tydings Act,[14] passed in 1937, amended the Sherman Act to permit such contracts where they were legal under state law, provided that they were not contracts ". . . between manufacturers, or between wholesalers, or . . . between persons, firms or corporations in competition with each other." In 1951 the Supreme Court held that it did not apply to price-fixing agreements made binding by state law on "non-signers" of such agreements. *Schweg-*

[14] The Miller-Tydings resale price maintenance act, 50 Stat. 693 (1937), 15 U.S.C. § 1, was enacted as an amendment to Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act. Taking the form of a proviso in Section 1 of the Sherman Act it states:

"Provided, that nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears . . . the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts of agreements of that description are lawful as applied to intrastate transactions, under any statute, law or public policy now or hereafter in effect in any State, Territory or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled "An Act to create a Federal Trade Commission, . . .

Provided further, that the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers or between factors, or between retailers or between persons, firms or corporations in competition with each other. . . ."

mann Bros. v. *Calvert Distillers Corp.*, 351 U.S. 384 (1951).[15]

Responding to that decision, Congress passed the McGuire Act Amendment to Section 5(a) of the Federal Trade Commission Act.[16] The McGuire Act not only reaffirmed

[15] Prior to *Schwegmann* many statutes permitted a trademark owner to require retailers who had notice of such agreements to observe resale price maintenance. In that case, the Court examined the Miller-Tydings Act and concluded that Congress had intended the words "contracts or agreements" to be used "in their normal and customary meaning", and to cover only agreements whereby the retailer voluntarily agreed to be bound by the resale price restrictions. It held that state resale price laws could not be applied to non-signers—"recalcitrants . . . dragged in by the heels and compelled to submit to price fixing." 341 U.S. at 390.

[16] 66 Stat. 631, 15 U.S.C. § 45 (1952). The Act provides in relevant part:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is the purpose of this Act to protect the rights of States under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce.

'Sec. 2. Section 5(a) of the Federal Trade Commission Act, as amended, is hereby amended to read as follows:

'Sec. 5(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

'(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements

the policy of the Miller-Tydings Amendment,[17] but also eliminated the restrictive effect of the Supreme Court's

of that description are lawful as applied to intrastate transactions under any statute, law or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

'(3) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements, whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

'(4) Neither the making of contracts or agreements prescribed in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

'(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. . . .'"

The McGuire Act did not repeal the Miller-Tydings Amendment to the Sherman Act and there are, therefore, two federal laws presently exempting state fair-trade acts from the prohibitions of the federal antitrusts. It is apparent, however, that the McGuire Act was intended to supersede the Miller-Tydings Amendment. See Callman, *Unfair Competition, Trademarks and Monopolies*, § 22.2.

[17] In order to safeguard interbrand competition, the Act prohibits horizontal price-fixing agreements and denies fair-trade contracts its protection unless the fair-traded product is "in free and open competition with commodities of the same general class." Thus, the Act contemplates the elimination of intraband price competition and relies for protection of the public interest upon interbrand price competition.

decision in *Schwegmann* by permitting states to enact laws for the enforcement of fair trade contracts against non-signers.[18] However, like the Miller-Tydings Amendment, it legalizes only vertical price maintenance contracts which are lawful in the state where the resale is made. Consequently, any analysis of The News' resale price maintenance system must begin with an examination of the New York Fair Trade Law.

The Feld-Crawford Act, as the New York Fair Trade Law[19] is commonly referred to, was modeled after the California Fair Trade Act of 1933.[20] Section 369-a permits vertical price fixing by authorizing the producer or owner of any brand-name commodity "which is in fair and open competition with commodities of the same general class" to fix by contract, a stipulated resale price and to require any dealer who may resell it to agree not to do so at other than the stipulated price. Section 369-b characterizes deviation from the agreement as unfair competition actionable by any person damaged, whether or not the violator is a party to the contract. Section 369-c completes the statutory

[18] The Report of the House Committee on Interstate Commerce which accompanied the McGuire Act declared that:

"The primary purpose of the bill is to reaffirm . . . that the application and enforcement of State fair-trade laws—including the non-signer provisions of such laws— . . . shall not constitute a violation of the Federal Trade Commission Act or the Sherman Antitrust Act. This reaffirmation is made necessary because of the decision of a divided Supreme Court in *Schwegmann* v. *Calvert Distillers Corporation* . . ."

[19] N.Y. Gen. Bus. L. § 369-a et seq.

[20] See *Bristol-Myers Co.* v. *Picker*, 302 N.Y. 61, 66 (1950). The constitutionality of the California Act, (Cal. Laws, 1931, Ch. 278, Deering's Gen. Laws of Cal., 1931, Act 8782, as amended, Cal. Laws 1933, Ch. 260, Deering's Gen. Laws Supp. 1933, Act 8782), was upheld in *The Pep Boys, Manny, Moe & Jack* v. *Pyroil Sales Co., Inc.*, 299 U.S. 198 (1936).

scheme by excluding horizontal resale price maintenance agreements from the operation of the statute.

The News' franchise agreement provides, among other things that the franchise dealer shall purchase from The News on each day of publication a sufficient number of copies of the newspaper to supply "all single copy home delivery subscribers within his territory" and shall supervise the delivery and resale of the newspapers to such regular subscribers at "no more than" the regular home delivery price established by The News.

Plaintiffs claim this provision is not within the protection of the Feld-Crawford and McGuire Acts and violates Section 1 of the Sherman Act. They allege that:

(1) The News is not in fair and open competition with commodities of the same general class;

(2) The News is controlling not merely the resale prices, but also the home delivery service charge;

(3) The Feld-Crawford and McGuire Acts only permit minimum resale prices to be fixed, not maximum resale prices; and

(4) The franchise agreement is an illegal horizontal agreement between wholesalers.

Plaintiffs' contention that The News is not in "free and open competition with commodities of the same general class" can be disposed of briefly.

The existence of "free and open competition" is a condition precedent to the legality of any resale price maintenance system.[21] See 1 Callman, *Unfair Competition Trade-*

[21] The quoted language is used in both the McGuire Act and the Miller-Tydings Act. The same requirement appears with a minor variation in the Feld-Crawford Act which permits resale price maintenance contracts relating to commodities in "fair and open competition."

marks and Monopolies § 23.3(a) (3rd Ed. 1971). This requirement is designed to assure that fair trade is limited to products which face sufficient interbrand competition to prevent them from eliminating horizontal price competition.[22] See *Eastman Kodak Co.* v. *F.T.C.*, 158 F.2d 592, 594 (2d Cir. 1946), *cert. denied*, 330 U.S. 828 (1947); Herman, *Free and Open Competition*, 9 Stan. L. Rev. 323 (1957); Note, 105 U. Pa. L. Rev. 415, 417 (1957).

Though the case law in this area is sparse, the decisions on point establish that a product is in "free and open competition" when there are other products which are purchased by consumers for the same purpose.[23] See *Columbia Records* v. *Goody*, 278 App. Div. 401, 105 N.Y.S.2d 659 (1st Dept. 1951); *General Electric Co.* v. *S. Klein-on-the-Square*, 121 N.Y.S.2d 37, 49-50 (1953). See also *Glen Roven Knitting Mills* v. *Sanson Hosiery Mills*, 189 F.2d 845, 854 (4th Cir. 1951); Fulda, *Resale Price Maintenance*, 21 U. Chi. L. Rev. 175, 198 (1954).

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[22] Though fair trade acts expressly sanction the elimination of intraband price competition, they seek to preserve interbrand competition by prohibiting horizontal price fixing and denying protection to products which are not in free and open competition with commodities of the same general class.

In this connection, the legislative history of the Miller-Tydings Act is instructive. It clearly indicates that Congress sought to validate resale price maintenance agreements only with respect to commodities which are in effective competition with similar commodities. 81 Cong. Rec. 7495 (1937) (remarks of Senator Tydings).

[23] *Eastman Kodak* v. *F.T.C.*, 158 F.2d 592 (2d Cir. 1946), *cert. denied*, 330 U.S. 828 (1947), cited by plaintiffs, does not hold to the contrary. In that case, the Second Circuit affirmed an F.T.C. order which was based on the Commission's finding that color film is not in the same general class as black and white film. This decision is of little precedential value because the Commission's findings are conclusive if they are supported by any evidence. See *F.T.C.* v. *Education Society*, 302 U.S. 112, 117 (1937).

Applying this test to the case at bar it becomes clear that The News is in free and open competition with the New York Times and a number of local newspapers in the suburban areas. Indeed, to meet this competition The News has been forced to embark on an aggressive home delivery system and to publish a number of suburban or zone sections.[24]

Plaintiffs' second contention is that The News is "not merely controlling resale prices, but . . . is actually controlling the home delivery service charge." This, they maintain, is not permitted by the Feld-Crawford Act. The only authority cited is a brief passage from *Bristol-Myers Co.* v. *Picker*, 302 N.Y. 61 (1950).[25]

The *Bristol-Myers* case involved a drug store and other retail establishments which, as members of the "Lynbrook Dividend Club", issued "cash register receipts" to their customers with all sales. These receipts were redeemable in merchandise for 2½% of the sale at any store in the club. Bristol-Myers contended that this amounted to an

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[24] These suburban sections are distributed as part of The News in specific geographic areas and carry local news and advertising. Currently The News produces special sections for the following areas: Manhattan, Bronx-Westchester, Passaic-Bergen, Newark, New Jersey, Brooklyn, Queens and Long Island, and Nassau-Suffolk.

[25] The passage reads:

"Considered as a method of advertising, the challenged scheme must be differentiated from types of service such as free parking, self-service, care of infants, entertainment, free delivery and the like, which we are not presently concerned. These other types of services have no direct relation to the article purchased or the price paid. They are completely separated and too remote from the pricing element to come within the statute's prohibition." 302 N.Y. at 68.

Plaintiffs made no attempt to develop any argument in support of their position and rely exclusively on this passage.

illegal reduction of its fair trade price and sued for an injunction.[26]

The New York Court of Appeals held that this practice constituted price cutting within the meaning of the Feld-Crawford Act and that Bristol-Myers was entitled to the relief requested, noting that:

> "The challenged scheme must be differentiated from types of service such as free parking, self-service, care of infants, entertainment, free delivery and the like . . . These other types of service . . . are too remote from the pricing element to come within the statute's prohibition." 302 N.Y. at 68.

Thus, rather than support plaintiffs' position, *Bristol-Myers* would seem to indicate that nothing in the Feld-Crawford Act prevents The News from fixing the home delivery price of its paper.[27]

Plaintiffs' third contention is that the Feld-Crawford Act does not authorize the fixing of maximum resale prices. Here, they argue that the New York decisions discussing the purposes for which the statute was enacted[28]

[26] Bristol-Myers had fixed minimum retail prices for its products pursuant to the New York Fair Trade Law and had expressly provided against sales below the established prices "by any means, device, combination sale, trading stamp, free goods, discount, rebate, or other allowance . . ." See Note, 63 Harv. L. Rev. 366, 367 (1949).

[27] It is significant that The News' franchise agreement makes no mention of service charges. Instead, it provides that the franchise dealer supervise the delivery and resale of the newspapers to subscribers at "no more than" the regular home delivery price established by The News.

[28] Plaintiffs rely principally upon *General Electric* v. *Masters*, 307 N.Y. 229 (1954); *Bristol-Myers Co.* v. *Picker*, 302 N.Y. 61 (1950); and *Bourjois Sales Corp.* v. *Dorfman*, 273 N.Y. 167 (1937).

and the statute read as a whole[29] require the conclusion that the sole legislative purpose was to permit the setting of minimum resale prices.

Although there is a dearth of decisional law in this area, and no square holding on point, what few cases there are lend support to the view that the terms "minimum" and "stipulated" are not synonymous, and that both the McGuire Act[30] and the Feld-Crawford Act authorize the setting of either a minimum or a stipulated (absolute) price. See *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384, 388 (1951); *Graham* v. *Triangle Publications, Inc.*, 233 F.Supp. 825, 830-831 (E.D. Pa. 1964), *aff'd* per curiam 344 F.2d 775 (3rd Cir. 1965); *Mead, Johnson & Co.* v. *West*

[29] Section 369-a(1) of the Feld-Crawford Act permits the producer of a commodity which bears its trademark, brand or name, and which is in "fair and open competition with commodities of the same general class produced by others" to "*stipulate*" the price at which its buyer may resell and also to provide that the buyer will not, in turn, resell except at the *price stipulated*.

Section 369-b provides that willfully and knowingly advertising, offering for sale or selling a commodity at less than the price stipulated by any contract pursuant to § 369-a is unfair competition and actionable by any person damaged thereby.

In support of their argument, plaintiffs stress the fact that § 369-b creates a cause of action only against those who knowingly and willfully sell "at less than the price stipulated in any contract" pursuant to § 369-a. However, the fact that § 369-b is silent with respect to enforcement against parties who sell *above* the stipulated price is not dispositive of this issue. In the ordinary situation there is no need for enforcement of maximum prices since anyone selling at a price higher than a generally observed maximum price would quickly lose sales as a natural consequence of competition. See Fulda, *Resale Price Maintenance*, supra, at 190. Cf. Adams, *Resale Price Maintenance: Fact and Fancy*, 64 Yale L. J. 967, 972 (1955).

[30] Paragraph 2 of the McGuire Act provides in pertinent part that nothing contained in the Antitrust Acts "shall render unlawful any contracts or agreements prescribing *minimum or stipulated prices*," lawful under State law.

Chester Discount Health & Vitamin Center, Inc., 212 F.Supp. 310 (E.D. Pa. 1962). See also *General Electric Co.* v. *S. Klein-on-the-Square, Inc.*, 121 N.Y.S.2d 37 (Sup. Ct. 1953).

Thus, in *Schwegmann*, supra, the Supreme Court considered a provision in the Louisiana Fair Trade Law which prevented a buyer from reselling "except at the price stipulated by the vendor." After contrasting it with the provision in the Miller-Tydings Act which provides for contracts or agreements prescribing "minimum prices", the Court concluded that ". . . Louisiana law sanctions the fixing of maximum as well as minimum prices . . ." 341 U.S. at 388.[31]

Similarly, in *Mead, Johnson & Co.* v. *West Chester Discount Health & Vitamin Center, Inc.*, supra, the court construed § 1 of the Pennsylvania Fair Trade Act which provides "[t]hat the buyer will not resell such commodity except at the price stipulated by the vendor." It found ". . . that the fixing of a minimum retail price is an exercise of some, but not all, of the authority conferred by the statutory right to set a stipulated price." 212 F.Supp. at

[31] This dicta assumes even greater significance when the language of paragraph 2 of the McGuire Act is examined. In permitting "contracts or agreements prescribing *minimum or stipulated* prices, Congress clearly intended to make lawful a type of contract not covered under the Miller-Tydings Act. See H. R. Report No. 1437, 72nd Congress, 2d Session, 1952, at pp. 5-6; Fulda, *Resale Price Maintenance*, 21 U.Chi. L. Rev. 175, 190 (1954). Since it had the benefit of the Supreme Court's construction of the Louisiana statute the conclusion is inescapable that it intended to sanction "the fixing of maximum as well as minimum prices."

Furthermore, to read "stipulated" as synonymous with "minimum" would violate the cardinal rule that "significance and effect shall if possible, be accorded to every word" in a statute. *Washington Market Co.* v. *Hoffman*, 101 U.S. 112, 115 (1879). See also *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955); *Ginsburg & Sons* v. *Popkin*, 285 U.S. 204, 208 (1932).

313. This language was quoted with approval in *Graham* v. *Triangle Publications, Inc.*, supra.

Moreover, despite plaintiffs' characterization of the New York decisions on this question, not one holds or states by way of dicta that the *sole* purpose of the New York legislature in enacting the Feld-Crawford Act was to allow for the maintenance of minimum resale prices.

Furthermore, contrary to plaintiffs' assertion, at least one New York decision, *General Electric Co.* v. *S. Klein-on-the-Square, Inc.*, supra, clearly holds that it authorizes agreements whereby "the buyer agrees to sell neither above nor below" a stipulated price.

> "There of course is a difference between preventing under-selling or price-cutting and preventing price gouging by selling above a designated price, and it may be that some fair trade laws forbid both while others forbid only one or the other. It is unnecessary to go into that. The N.Y. statute forbids selling at less than the price stipulated in a contract, and a price is stipulated in a contract by which the buyer agrees not to sell below a stated price as well as in a contract by which the buyer agrees to sell neither above nor below that price.
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> ". . . a price is stipulated or prescribed in a contract by which the buyer agrees not to sell below a stated price as well as in a contract by which the buyer agrees to sell neither above nor below that price, or, in the phrase defendant likes 'at that price'." 121 N.Y.S.2d at 46, 47.

In the absence of any square holding to the contrary, I find the reasoning of the *General Electric* case persuasive.

Accordingly, I reject plaintiffs' contention that the Feld-Crawford Act permits only the fixing of minimum prices.

Plaintiffs' final argument is that the franchise agreement is one between wholesalers and, therefore, is not protected by the McGuire Act. They contend that The News is a wholesaler in that it sells its newspapers directly to newsstand and franchise dealers and that the franchise dealers are also wholesalers because they, in turn, sell, at wholesale, to the carrier boys.

The News, on the other hand, denies that such direct sales make it a wholesaler. It contends that it is on a different functional level than its franchise dealers and argues that any agreement between them is vertical. It asserts that nothing in the Feld-Crawford Act prohibits an integrated manufacturer-wholesaler from making fair trade contracts with independent wholesalers.

I am prepared to accept this construction of the New York Fair Trade Laws. See *Eastman Kodak Co.* v. *Schwartz,* 133 N.Y.S.2d 908 (Sup. Ct. 1954); *Gillette Safety Razor Co.* v. *Green,* 3 N.Y.S.2d 822 (Sup. Ct.), aff'd 258 App. Div. 723, 15 N.Y.S. 142 (1938). However, whatever reach the New York courts might give the New York Fair Trade Laws is subject to McGuire Act limitations. See *Janel Sales Corp.* v. *Lanvin Parfums, Inc.,* 396 F.2d 398, 401 (2d Cir.), *cert. denied,* 393 U.S. 938 (1968); *Sunbeam Corp.* v. *Masters, Inc.,* 157 F.Supp. 689, 691 (S.D.N.Y. 1957).

That Act expressly condemns "horizontal" price fixing agreements. Paragraph 5 provides that:

> "Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers,

> or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other." 15 U.S.C. § 15(a)(5).

In spite of what seems to be quite clear, the interpretation of this paragraph is still somewhat unsettled. See generally, Callman, *Unfair Competition, Trademarks & Monopolies* § 23.3(c).

In *United States* v. *McKesson & Robbins,* 351 U.S. 305 (1956), the Supreme Court held that a manufacturer-wholesaler could not enter into fair trade agreements with independent wholesalers who competed with its wholesale division on the ground that both the Miller-Tydings and McGuire Acts specifically exclude from their antitrust exemption all agreements ". . . between wholesalers . . . in competition with each other." In reaching this result, the Court rejected McKesson's argument that in contracting with independent wholesalers it acted solely as a manufacturer selling to buyers rather than as a competing wholesaler. It refused to compartmentalize McKesson's business and stated that "the statutes provide no basis for sanctioning the fiction of McKesson . . . acting only as a manufacturer when it concludes 'fair trade' agreements with competing wholesalers. These were agreements between wholesalers." 351 U.S. at 312.

The *McKesson* decision cast substantial doubt on the legality of fair trade agreements between vertically integrated manufacturers and independent wholesalers and retailers; Herman, *Fair Trade and McKesson & Robbins,* 44 Cal. L. Rev. 853, 857 (1956); Note, 46 Georgetown L.J. 166, 175 (1957); Note, 24 Univ. of Chi. L. Rev. 533, 538 (1957); see also Weston, *Resale Price Maintenance and Market Integration: Fair Trade or Foul Play?,* 22 Geo.

Wash. L. Rev. 658 (1954), but did not completely clarify the meaning of paragraph 5. As recently as 1967 it was unclear whether the final phrase of the section, "in competition with each other", modifies only the immediately preceding phrase, "between persons, firms, or corporations", or also modifies the other preceding phrases, such as "between manufacturers", "between retailers" and "between wholesalers". Compare *Johnson & Johnson* v. *Avenue Merchandise Corp.*, 193 F.Supp. 282, 287 (S.D.N.Y. 1961), with *Upjohn Company* v. *Charles Labs, Inc.*, 277 F.Supp. 445 (S.D.N.Y. 1967) and *Parke, Davis & Co.* v. *Rocket Drugs, Inc.*, 214 F.Supp. 937, 938 (S.D.N.Y. 1963). See also, *Esso Standard Oil Co.* v. *Secatore's Inc*, 246 F.2d 17, 21 (1st Cir.), *cert. denied*, 355 U.S. 834 (1957).[11]

In *Janel Sales Corp.* v. *Lanvin Parfums, Inc.*, 396 F.2d 398 (2d Cir.), *cert. denied*, 393 U.S. 938 (1968), the Second Circuit considered this specific question and concluded that "the legislative history indicates that it is immaterial whether a manufacturer-retailer and a signing retailer are in actual competition." 396 F.2d at 403. Accord, *Ar-Ex Products Co.* v. *Capital Vitamin & Cosmetic Corp.*, 351 F.2d 938 (1st Cir. 1965).

In *Janel*, the defendant was a widely known manufacturer of perfumes and other toiletries which sold its products directly to retail outlets pursuant to a fair trade agreement. The plaintiff, Janel Sales Corp., operated a chain of discount drug stores in New York City, but was not a direct account of Lanvin. It acquired Lanvin's products from other retail stores for less than the stipulated resale price and sold them at a discount. Lanvin successfully sued in the state court to enjoin Janel from selling Lanvin perfumes below the fair trade price. Janel countered with a federal action against Lanvin attacking the legality of the fair trade contract underlying the state injunction.

[11] If the pharse "in competition with each other" modifies all the preceding phrases there must be a showing of some quantum of competition between the vertically integrated manufacturer and the signing retailer or wholesaler before the agreement falls within the scope of paragraph (5). See *Janel Sales Corp.* v. *Lanvin Parfums, Inc.*, 396 F.2d 398, 403 (2d Cir.), *cert. denied*, 363 U.S. 938 (1968). However, if it does not, the presence or absence of competition is immaterial and any contract "between manufacturers, or between producers, or between wholesalers . . . or between retailers" is unlawful. See Note, 43 N.Y.U. L. Rev. 997, 1002 (1968). Either interpretation is possible.

It charged that certain "promotional" and "accommodation" sales made by Lanvin were retail sales which, as a matter of law, deprived Lanvin's fair trade agreements of the protection of the McGuire Act. Lanvin, on the other hand, contended that its "promotional" and "accommodation" sales did not render it a "retailer" or a "competitor". The Court of Appeals held that these assertions raised triable issues of fact.

Though it did not supply a precise standard for determining whether a party is a "retailer" or a "competitor" within the terms of the McGuire Act, it followed McKesson's teaching that the words of the statute are to be read "in their normal and customary reading." *United States* v. *McKesson & Robbins*, supra, at 312; see also, *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384, 388 (1951).

More importantly, the Court of Appeals held that any manufacturer or producer who maintains retail or wholesale outlets of his own (one who engages in any direct selling aside from "promotional" or "accommodation" sales) is a "retailer" or "wholesaler" and is therefore not permitted to establish fair trade agreements with any other retailer or wholesaler.

Applying these principles to the case at bar, the conclusion is inescapable that The News is a wholesaler, Cf. *Dahl* v. *Hearst Corp.*, 1972 Trades Cases ¶ 74,196 (C.D. Cal.), within the normal and customary definition of "wholesaler" as one whose business is the selling of goods in gross to retail dealers. See *Harris* v. *Hammond*, 51 F.Supp. 91, 94 (S.D. Ga. 1943), *aff'd*, 145 F.2d 333 (5th Cir. 1944); *Zehring* v. *Brown Materials*, 48 F.Supp. 740, 743 (S.D. Cal. 1943); *Veazey Drug Co.* v. *Bruza*, 169 Okl. 418, 37 P.2d 294 (1934); *Monoco Oil Co.* v. *Town of Pittsford, Co. of Monroe*, 300 N.Y.S.2d 488, 493 (1969).

The News distributes its newspapers to retailers through mixed channels. It acts as a wholesaler by making direct sales to retailers (e.g., street sale dealers) and also sells through independent wholesalers. In so doing, its status as a producer or manufacturer is changed into that of a manufacturer-wholesaler. *Janel Sales Corp.* v. *Lanvin Parfums, Inc.*, supra; *Ar-Ex Products Co.* v. *Capital Vitamin & Cosmetic Corp.*, supra, at 940; *Dahl* v. *Hearst Corp.*, supra. Cf. *United States* v. *McKesson & Robbins*, supra. Since The News' franchise dealers also function as wholesalers in selling to their carrier boys, it follows that their relationship with The News is horizontal and not vertical. Therefore, The News and its franchise dealers are both wholesalers within the meaning of the McGuire Act and they are not free to enter into price fixing agreements which affect "interstate commerce" as that term is used in the Sherman Act. *United States* v. *McKesson & Robbins*, supra; *Janel Sales Corp.* v. *Lanvin Parfums, Inc.*, supra.

Accordingly, I hold that The News' franchise agreement is not immunized from the Sherman Act by the McGuire Act and that it entered into illegal price maintenance agreements with its dealers. See *United States* v. *Socony-Vacuum Oil Co.*, supra; *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, supra.

This result is a harsh one. Nonetheless, it is the result dictated by the Supreme Court's admonition that the exemption accorded by Congress in the Miller-Tydings and McGuire Acts be narrowly construed.[33]

Plaintiffs also contend that The News is a retailer within the meaning of the McGuire Act because it distributes its newspaper through the mails. Relying on *Janel Sales Corp.*, supra, they maintain that these "retail" sales place it on the same functional level as its carrier boys and therefore bar it from fixing the prices at which they sell The News. This contention can be disposed of briefly.

In the six month period ending September 30, 1971, The News had only 391 mail subscribers in the entire metropolitan area.[34] These subscribers received the paper a day or more after the issue date and paid a higher price than the newsstand or home delivery price. Generally, only clipping services, libraries, or persons without access to newspapers subscribe by mail.

In my view, these sales must be classified as "legitimate accommodation sales" and common sense requires their exclusion in determining whether The News is functionally a retailer. See *Janel Sales Corp.* v. *Lanvin Parfums, Inc.*, supra, at 403; *General Electric Co.* v. *Hess Brothers, Inc.*,

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[33] See e.g. *United States* v. *McKesson & Robbins*, supra, at 316:

"Congress has marked the limitations beyond which price fixing cannot go. We are not only bound by those limitations but we are bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy."

[34] This represented about one-hundredth of 1% (.0001) of its total average paid circulation.

155 F.Supp. 57, 62 (E.D. Pa. 1957).[35] In any event, these sales are de minimus. See *Janel Sales Corp.* v. *Lanvin Parfums, Inc.*, supra; *Johnson & Johnson* v. *Avenue Merchandise Corp.*, supra, at 289-290.

V.

THE NEWS' REFUSAL TO DEAL WITH PLAINTIFFS WAS PURSUANT TO AN ILLEGAL PRICE FIXING AGREEMENT AND THEREFORE CONSTITUTES A PER SE VIOLATION OF SECTION 1 OF THE SHERMAN ACT.

The News contends that its refusal to deal with plaintiffs[36] is totally unrelated to any of the provisions of the franchise agreement and is merely an exercise of its right

[35] In *Janel Sales Corp.* v. *Lanvin Parfums, Inc.*, supra, the Second Circuit indicated that a retail sale could be identified by considering "the actual size of the sale, the dollar value of the sale and the number of similar sales that are made." 396 F.2d at 403. Applying this test to the News' mail subscriptions, it becomes clear that they do not rise to the level of "retail sales."

[36] Plaintiffs Freilich, Rosenblatt, Theall, Salant and Cestaro continue to receive copies of The News. Though plaintiff Theall testified that he observed a franchise dealer operating on his route (Tr. 1078), it is undisputed that there is no franchise dealer in his area or any adjoining area. Since all of these plaintiffs operate in areas in which the franchise system has not been instituted, they have no standing to challenge any of The News' policies or any of the provisions of the franchise agreement. See *Billy Baxter, Inc.* v. *Coca-Cola Company*, 411 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923, *reh. denied*, 401 U.S. 1014 (1971); *SCM Corp.* v. *Radio Corp. of America*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969). Cf. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). The same is true of plaintiffs Ellis, Marston and Silverstein who continued to receive The News until they sold their routes. All of these plaintiffs have failed to show that their competitive positions have been injured and consequently, they fail to make out a claim for relief under the antitrust laws. *GAF Corporation* v. *Circle Floor Co., Inc.*, 463 F.2d 752 (2d Cir. 1972), *petition for cert. filed*, 41 U.S.L.W. 3410 (U.S. Jan. 12, 1973) (No. 72-984).

to choose its customers and its methods of distribution. It claims that its decision to discontinue selling to plaintiffs was a business judgment that the institution of a franchise system would increase its circulation and provide better and more efficient service to its home delivery subscribers. Accordingly, it argues that this case is controlled by *United States* v. *Colgate*, 250 U.S. 300 (1919), and other cases holding that a unilateral decision by a producer to substitute one distributor for another is not actionable under the antitrust laws.[37]

Plaintiffs Hand, Shank, Greenberg and Holman also continue to receive copies of The News even though they operate in areas in which the franchise system has been instituted. Plaintiff Fox was in the same position before he sold his route. Accordingly, these plaintiffs do not challenge The News' decision to terminate sales to the other plaintiffs. Instead, they contend that they have been injured by the provision in the franchise agreement which requires the franchise dealers to resell The News at stipulated prices and by the price discrimination practiced by The News against them. They allege that the franchise agreement substitutes the judgment of The News for the forces of the competitive market and severely limits their ability to compete and survive. Cf. *Albrecht* v. *Herald Co.*, 390 U.S. 145, 152 (1968); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

Since the record amply demonstrates the validity of this contention, they have established all the elements of a Sherman Act violation and are entitled to recover treble damages regardless of whether The News could lawfully have terminated sales to them or to the other plaintiffs. See *United States* v. *Parke, Davis & Co.*, supra; *GAF Corporation* v. *Circle Floor Co., Inc.*, supra.

[37] The News cites many cases for the proposition that a producer is free to replace on distributor with another. See e.g., *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 376 (1967); *Anaya* v. *Las Cruces Sun News*, 455 F.2d 670 (10th Cir. 1972); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 76 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062, *reh. denied*, 397 U.S. 1003 (1970); *Ace Beer Distributors, Inc.* v. *Kohn, Inc.*, 318 F.2d 283, 286-87 (6th Cir. 1963). In doing so, it argues that "[t]he record clearly shows that any adverse economic impact on plaintiffs' businesses is attributable solely to The News' termina-

Plaintiffs, on the other hand, contend that The News' decision to terminate sales to them was part of an effort to enforce an illegal price maintenance scheme.[38] They allege that The News combined with its franchise dealers and others to prevent them from acquiring copies of The News in order to protect the franchise dealers from intrabrand competition and to allow The News to control the home delivered price of its paper.[39]

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tion of sales to such plaintiffs." Brief for Defendants at 20. *Thus, it contends that even if the franchise agreement is illegal, the plaintiffs were not injured by reason of anything in it and that the only private parties with standing to challenge it are the franchise dealers.*

[38] The News concedes that this allegation raises the "most critical issue" in the case. The reason is clear.

It is well settled that any attempt by a producer to secure resale price maintenance which goes beyond the "mere announcement of his policy" regarding prices and "the simple refusal to deal" is unlawful. *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44-45 (1960). See also, *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968); *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 17 (1964). Cf. *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 78 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062, *reh. denied*, 397 U.S. 1003 (1970). Thus, if The News terminated sales to the plaintiffs pursuant to an illegal price fixing scheme, they have been injured by reason of something "forbidden in the antitrust laws." See *Interphoto Corporation* v. *Minolta Corporation*, 295 F.Supp. 711, 721 (S.D.N.Y.), *aff'd*, 417 F.2d 621 (2d Cir. 1969). Cf. *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968); *United States* v. *General Motors*, 384 U.S. 127, 146-48 (1966); Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. Pa. L. Rev. 847, 877-82 (1955).

[39] Plaintiff Rathsam relies solely on these allegations. He acquired his route from a cut-off route dealer and never sought to purchase directly from The News. However, he testified that he was subjected to the same type of predatory conduct that the other route dealers experienced (Tr. 869-870) and therefore claims that he was injured by reason of the illegal combination to fix prices.

In *Colgate*, supra, the Supreme Court recognized the general right of a businessman to select his customers and refuse to deal.[40] However, in successive decisions, the teaching of that case has been considerably narrowed. See e.g., *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968); *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *United States* v. *Parke, Davis & Co.*, 363 U.S. 29 (1960).

In *United States* v. *Parke, Davis & Co.*, supra, the defendant sought to maintain resale prices by refusing to sell its products to retailers who resold below its suggested prices. A similar policy was enunciated with respect to its wholesalers who were informed that it would refuse to sell them if they cut prices or sold to price-cutting retailers. When certain retailers persisted in cutting prices, the company and the wholesalers stopped supplying them. Subsequently, it informed the price-cutters that their source of supply would be reopened if they would indicate a willingness to cooperate; when the retailers agreed, sales were resumed. The government sought an injunction against these practices and the company defended on the ground that its conduct was legal under the *Colgate* doctrine.

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[40] In *Colgate*, the defendant manufacturer had secured substantial control over resale pricing by wholesalers and retailers by announcing that it would not deal further with price cutters. The government obtained an indictment charging an unlawful combination under Section 1 of the Sherman Act. The Supreme Court sustained dismissal because it did "not charge Colgate with selling its products to dealers under agreements which obligated the latter not to resell except at prices fixed by the Company." 250 U.S. at 307. In doing so, the Court noted that:

> "The purpose of the Sherman Act . . . to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer . . . freely to exercise his own discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell." 250 U.S. at 307.

Looking at this series of allegedly unilateral acts, the Supreme Court found that Parke, Davis had embarked upon a program to promote compliance with its suggested resale prices which "plainly exceeded the limitations of the Colgate doctrine" and which constituted an unlawful combination in restraint of trade. The Court stated that:

> ". . . an unlawful combination is not just such as arises from a price maintenance *agreement*, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy . . .
>
> When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices . . . he has put together a combination in violation of the Sherman Act." 362 U.S. at 43, 44.

The scope of *Parke, Davis* was somewhat clarified in *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964). There, the plaintiff, a retail service station lessee, signed a consignment agreement for a term concurrent with his lease under which Union set the prices at which he would sell gasoline to the public.[41] When he sold gasoline below the fixed price to meet competition, Union refused to renew his lease.

The Court found that Union had used the threat of termination of the lease as the means of enforcing its pricing scheme and held Union's consignment system illegal. In

[41] The agreement plaintiff signed was Union's standard retail consignment agreement and provided that his compensation was to be on a commission basis. 377 U.S. at 15.

rejecting the claim that its termination of the plaintiff's dealership was a more refusal to deal within the meaning of *Colgate*, the Court said:

> "We made clear in *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, that a supplier may not use coercion on its retail outlets to achieve resale price maintenance. We reiterate that view, adding that it matters not what the coercive device is. *United States* v. *Colgate*, 250 U.S. 300, as explained in *Parke, Davis*, 362 U.S. at 37, was a case where there was assumed to be no agreement to maintain retail prices. *Here we have such an agreement;* it is used coercively, and it promises to be equally if not more effective in maintaining gasoline prices than were the *Parke, Davis* techniques in fixing monopoly prices on drugs." 377 U.S. at 17. (Emphasis added).

Union Oil was followed by *United States* v. *General Motors*, 384 U.S. 127 (1966),[42] in which the Court reiter-

[42] In *United States* v. *General Motors*, supra, the government brought a civil action under Section 1 of the Sherman Act against General Motors Corporation and three associations of Chevrolet dealers in the Los Angeles area to enjoin them from conspiring to prevent certain franchised dealers from maintaining sales relationships with discount houses. As a result of pressure from dealers who were losing sales to the discount houses, General Motors advised all its franchisees that selling cars to discount houses might constitute a violation of the franchise agreement, and elicited promises from them to desist from further sales. The defendant associations jointly financed the policing of these promises and, as violations were discovered, General Motors enforced compliance.

Finding a "classic conspiracy in restraint of trade", the Court held the arrangement unlawful per se.

> "The principle of these cases is that where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct.

ated its view that agreements or combinations to maintain prices are unlawful per se no matter what form they take.

> "The protection of price competition from conspiratorial restraint in an object of special solicitude under the antitrust laws. We cannot respect that solicitude by closing our eyes to the effect upon price competition of the removal from the market, by combination or conspiracy, of a class of traders. Nor do we propose to construe the Sherman Act to prohibit conspiracies to fix prices at which competitors may sell, but to allow conspiracies to put competitors out of business entirely." 384 U.S. at 148.

The most recent case interpreting *Colgate* is *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968). A newspaper publisher announced that it would compete with or refuse to deal with any distributor who refused to abide by its suggested resale price. When Albrecht raised its price over the suggested maximum, it hired an independent sales solicitation firm (Milne) to contact his customers and offer delivery at a lower rate. As a result, some of Albrecht's customers switched to direct delivery by the publisher, and it subsequently turned these customers over to another dealer (Kroner) with the understanding that he might have to return them to Albrecht if he accepted the maximum price ceiling.

• • • Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins or their system [of distribution] • • •." 384 U.S. at 146

In holding that the publisher had put together a combination to fix resale prices which was per se illegal under the Sherman Act, the Court rejected the defendant's contention that its conduct was wholly unilateral.

> "§ 1 of the Sherman Act . . . covers combinations in addition to contracts and conspiracies, express or implied. The Court made this quite clear in *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960), where it held that an illegal combination to fix prices results if a seller suggests resale prices and secures compliance by means in addition to the 'mere announcement of his policy and the simple refusal to deal. . . .'
>
> If a combination arose when Parke Davis threatened its wholesalers with termination unless they put pressure on their retail customers, then there can be no doubt that a combination arose between respondent, Milne, and Kroner to force petitioner to conform to the advertised retail price." 390 U.S. at 149.

Thus, the controlling decisions have distinguished between situations on the one hand, in which the manufacturer simply announced a suggested resale price and refused to sell to dealers who would not adhere to it,[43] and on the other,

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[43] Despite limitations of the *Colgate* doctrine in recent years, it is still true that a mere refusal to deal, without more, is not a Sherman Act violation. *GAF Corporation* v. *Circle Floor Co.*, 329 F.Supp. 823, 828 (S.D.N.Y. 1971), *aff'd*, 463 F.2d 752 (2d Cir. 1972), *petition for cert. filed*, 41 U.S.L.W. 3410 (U.S. Jan. 12, 1973) (No. 72-984). See also, *House of Materials, Inc.* v. *Pattern Co.*, 298 F.2d 867 (2d Cir. 1962); *Carbon Steel Products Corp.* v. *Alan Wood Steel Company*, 289 F.Supp. 584 (S.D.N.Y. 1968). "The Supreme Court has left a narrow channel through which a manufacturer may pass even though the facts would have to be of such Doric simplicity as to be somewhat rare in this day of complex business enterprise." *Warner & Co.* v. *Black & Decker Mfg. Co.*, 277 F.2d 787, 790 (2d Cir. 1960).

those in which the manufacturer took further steps to effectuate compliance. If, above and beyond a mere unilateral announcement and refusal to deal steps are taken in order to secure compliance with price maintenance policies, the arrangement constitutes a combination to maintain prices, and is a per se violation of the Sherman Act. *Albrecht* v. *Herald Co.*, supra; *Simpson* v. *Union Oil Co.*, supra; *United States* v. *Parke, Davis & Co.*, supra.

Applying this test to the facts of the instant case, it becomes clear that The News' reliance on *Colgate* is totally misplaced. The record clearly demonstrates that The News terminated sales to most of the plaintiffs only after they refused to participate in its resale price maintenance scheme. When this failed, it enlisted the aid of its franchise dealers and third parties to detect the route dealers' "unauthorized sources" of supply, which, according to O'Sullivan and Catanzaro, would be terminated. (Tr. *1087; 1106; 1323-24*). As a result, the route dealers were under constant surveillance by franchise dealers, employees of The News, and off-duty policemen recruited for this purpose. (Tr. 127-28; 631-33; 704; 779-80; 795-97; 826; 869-70; 1087-88; 1090-91; 1099-1100; 1106-1107). The News even went so far as to have two-way radios installed in four of its cars so that it could coordinate its surveillance activities. (Tr. 1098-1101; 1104). When sources of supply were located, The News terminated (or threatened to terminate) all sales to that source or reduced the number of copies it received so that it could no longer supply the cut off route dealers. (Tr. 711-12; 727; 763; 906-907).

The News also instructed its franchise dealers to tell potential home delivery subscribers that the route dealers were no longer in business and that they could obtain home delivery of The News only through authorized franchise

dealers. (Tr. 1114-15; 1334-35)."[44] Cf., *United States* v. *Albrecht*, supra, at 190 n. 6.

These anticompetitive practices cannot be considered as isolated incidents, unrelated to The News' illegal price maintenance system. Rather, the record indicates that this concerted activity was designed and executed so as to prevent plaintiffs from dealing in The News and to allow it to control the home delivered price of its paper.

Accordingly, I find that The News' refusal to deal with the plaintiffs is part of an aggregation of trade restraints and predatory practices designed to fix prices in violation of § 1 of the Sherman Act. Cf. *United States* v. *General Motors*, supra; *Interphoto Corp.* v. *Minolta Corp.*, 295 F.Supp. 711, 723 (S.D.N.Y.) *aff'd* 417 F.2d 621 (2d Cir. 1969). It follows that the route dealers who were cut off by The News on or after January 10, 1966 have established all of the necessary elements of a § 1 Sherman Act violation. The same is true for plaintiff Rathsam against whom The News and its franchise dealers conspired to prevent from obtaining papers.

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[44] Plaintiffs claim that The News used lists of customers previously supplied by them to solicit their customers. However, a careful review of the 2,000 page record in this case reveals no evidence which substantiates this claim.

Plaintiffs also contend that the territorial[45] and customer[46] restrictions in the franchise agreement violate Section 1 of the Sherman Act. These contentions do not require extended discussion.

In *United States* v. *Arnold, Schwinn*, 388 U.S. 365 (1967), the Supreme Court considered such restrictions and found them to be per se violations of the Sherman Act.

The Schwinn distribution network consisted of 22 wholesale distributors who were permitted to resell Schwinn products only to franchise dealers in assigned territories.

[45] Section III of The News' Independent Home Delivery Carrier Agreement provides, inter alia, that:

"The territory to which this agreement shall apply and in which the sales of copies of the Daily and Sunday News to home delivery subscribers shall be made by the carrier is known and designated as Home Delivery Area Number —— . . ."

The News strenuously urges that the franchise agreement does not limit the area in which the franchise dealers are permitted to sell The News. I find this reading of the agreement is contrary to its plain language and spirit. Cf. *Lepore* v. *The New York News, Inc.*, 346 F.Supp. 755, 761 (1972).

The News granted each franchise dealer an exclusive territory in order to insure that he would devote his time and effort to developing sales in that territory. In this way, each dealer would concentrate on taking business away from The News' competitors rather than from his fellow franchise dealers. See Note, *Restricted Channels of Distribution Under the Sherman Act*, 75 Harv. L. Rev. 795 (1962); Cf. Stewart, *Exclusive Franchises and Territorial Confinement of Distributors*, 22 A.B.A. Antitrust Section 33, 37 (1963).

[46] Section II of the Agreement provides that the franchise dealer: " . . . agrees . . . to purchase from The News, on each day of publication, a sufficient number of copies of the Daily and Sunday News to supply all single copy home delivery subscribers within his territory . . . [and] to supervise and direct the resale of the Daily and Sunday News to such regular subscribers in his territory . . ."

The News concedes that this clause of the agreement prohibits the franchise dealers from reselling newspapers purchased from it to anyone other than their delivery boys.

Schwinn would ship its bicycles to the distributors on a sale or consignment basis, or alternatively would ship directly to the franchise dealer pursuant to an order placed through the distributor. The recipients of the bicycles could transfer them only to ultimate consumers or franchised dealers. Schwinn did not, however, control the resale prices of either the wholesalers or the retailers, except in the case of a few fair traded models.

The Court held that even in the absence of price fixing, it is "unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it." 388 U.S. at 379. The Court ordered entry of a decree enjoining Schwinn from imposing any limitations on the distributors' and retailers' rights to dispose of purchased Schwinn products "where and to whomever they choose."

The News' franchise agreement, therefore, falls squarely within the proscription of *Schwinn* because it parts with title, dominion and risk of loss when it sells its newspapers to its franchise dealers.[47]

Moreover, these restrictions are unlawful even under pre *Schwinn* authority. It has long been established that vertical restraints as to territory or customers are per se violations of the Sherman Act if they are ancillary to price fixing as they clearly are here. See *White Motor Co.* v. *United States*, 372 U.S. 253, 260 (1963); *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707, 720 (1944). See also, *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 373 (1967); *United States* v. *Sealy, Inc.*, 388 U.S. 350, 357 (1967).

[47] Section III(e) of the franchise agreement specifically provides that "The carrier will not . . . have the right to return . . . unsold copies of the Daily or Sunday News."

VI.

THE INSTITUTION OF THE FRANCHISE DELIVERY SYSTEM WAS NOT AN ATTEMPT TO MONOPOLIZE.

Plaintiffs further claim that defendants "attempted to monopolize and combined and conspired to monopolize, a part of the newspaper trade", by driving them out of business. They do not, however, argue that defendants actually monopolized[48] any market or submarket.

The Supreme Court has succinctly defined "attempt to monopolize" as the "employment of methods, means and practices which would, if successful, accomplish monopolization, and which though falling short nevertheless approach so close as to create a dangerous probability of it." *American Tobacco Co.* v. *United States*, 328 U.S. 781, 785 (1946). See also, *Lorain Journal* v. *United States*, 342 U.S. 143, 153 (1951); *Swift & Co.* v. *United States*, 196 U.S. 375, 396, 402 (1905). The necessary elements of an attempt to monopolize are (1) a specific intent to effect a

[48] Section 2 of the Sherman Act, 15 U.S.C. § 2, makes it illegal for any person to "monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations . . ."

Thus, Section 2 establishes three separate offenses: (a) monopoly, (b) attempting to monopolize, and (c) combining or conspiring with any other persons to monopolize any part of the trade or commerce among the several states, or with foreign nations.

The basic element of the offense of monopolization is possession of monopoly power—that is, ability to control prices in and exclude competitors from the relevant market. *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391, 393 (1956); *United States* v. *Griffith*, 334 U.S. 100, 107 (1948); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 811 (1946); *Standard Oil Co. of N.J.* v. *United States*, 221 U.S. 1, 51 (1911).

consequence definable as monopolizing[49] and (2) conduct imminently threatening accomplishment of that consequence.[50] See *Times-Picayune Pub. Co.* v. *United States*, 345 U.S. 594, 626 (1953); *Lorain Journal* v. *United States*, supra, at 153; *Swift & Co.* v. *United States*, supra, at 396; *United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1961). See also, Note 27 Geo. Wash. L. Rev. 227, 244 (1958). This definition is consistent with the general criminal rule that an attempt is not made out unless the conduct, if successful, would constitute the crime.[51] See Holmes, *The Common Law*, 65-70 (1881); Hall, *Criminal Attempt—A Study of Criminal Liability*, 49 Yale L.J. 789 (1940); Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 Yale L.J. 53 (1930). See also, *Diamond International Corp.* v. *Hoefer*, 289 F.Supp. 550, 577 (D. Md. 1968). Obviously, proof of a relevant market is essential to a claim of attempted monopolization in that one cannot determine whether the defendant's conduct, if suc-

[49] Specific intent requires proof that the defendant intended the particular acts in question, as well as proof that he intended thereby to acquire monopoly power. See *Times-Picayune Pub. Co.* v. *United States*, supra, at 626; *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 432 (2d Cir. 1945). Cf. *Morissette* v. *United States*, 342 U.S. 246 (1952); *United States* v. *Illinois Cent. R. Co.*, 303 U.S. 239 (1938).

[50] This element is sometimes equated with dominant market power. See *Lorain Journal* v. *United States*, *supra*, at 154; *Cornwall Quality Tools Co.* v. *C.T.S. Company*, 446 F.2d 825, 830 (9th Cir.), *cert. denied*, 404 U.S. 1049 (1971).

[51] This situation is characterized as legal (as opposed to factual) impossibility. Thus, where the taking of a particular object would not be larceny, the attempt to do so cannot be attempted larceny. *People* v. *Jaffe*, 185 N.Y. 497 (1906). See also, *Morissette* v. *United States*, 342 U.S. 246, 261 n. 19 (1952). Factual impossibility, on the other hand, does not preclude a conviction for attempt. See Note, 42 N.Y.U. L. Rev. 110, 114 (1967).

cessful, would amount to monopolization without definition of the market sought to be dominated.[52] *Walter Process Equipment, Inc.* v. *Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965); *Diamond International Corp.* v. *Hoefer*, 289 F.Supp. 550, 577 (D. Md. 1968); *United States* v. *Chas. Pfizer & Co.*, 245 F.Supp. 737, 739 (E.D.N.Y. 1965). But see *Lessie* v. *Tidewater Oil Co.*, 327 F.2d 459, 474 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964).

The relevant market is the "area of effective competition" in which the defendant operates. *Standard Oil of Cal.* v. *United States*, 337 U.S. 293, 299 n.5 (1949). It consists of both a product market and a geographic market. *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966). To delineate the relevant market attention must be focused on the products which compete with The News in the home delivery market; that is, the spectrum of products in which there is such a cross elasticity of demand that consumers will turn to them if The News' home delivery price or other conditions of sale render it undesirable. See *United States* v. *du Pont de Nemours & Co.*, 351 U.S. 377, 395-400 (1956). Likewise, the market must be carved out geographically, by determining the area in which The News' home delivery program faces meaningful competition. See *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U.S. 268, 279 (1934).

[52] Since monopolizing requires monopoly power, there is no serious threat of monopolization unless the actor holds monopoly power or there is a dangerous probability he can acquire monopoly power. Note, 27 Geo. Wash. L. Rev. 227, 244 (1958). Cf. *United States* v. *Consolidated Laundries Corporation*, 291 F.2d 563, 573 (2d Cir. 1961).

In this case, it is clear that the relevant geographic market is the New York City Metropolitan area.[53] The identification of the relevant product market, however, is more complex.

The leading case outlining the criteria for determining the relevant product market is *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956). In that case, the government charged du Pont with monopolizing interstate commerce in cellophane. DuPont acknowledged that it was the leading cellophane manufacturer, but argued that there was intense price and quality competition between cellophane and other wrapping materials and that it therefore lacked monopoly power over the market in which cellophane was sold. The case turned on whether the relevant market was cellophane (of which du Pont had a predominant 75% share) or all "flexible packaging material" (of which du Pont's share was less than 20%).[54]

The Court held that the relevant market was "composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." 351 U.S. at 404.[55] It therefore focused on whether there were substitutes for cellophane and held

[53] For purposes of this discussion, the New York City Metropolitan Area is defined as New York City and the surrounding areas of New York, Connecticut, and New Jersey within a radius of fifty miles from the City.

[54] The Court noted that "If cellophane is the 'market' that du Pont is found to dominate, it may be assumed it does have monopoly power over that 'market'." 351 U.S. at 391.

[55] Earlier in the opinion the Court expressed a similar view:

> "[W]here there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differs from others. If it were not so, only physically identical products would be a part of the market. 351 U.S. at 394.

that the identity of the relevant market depended on whether there was a cross-elasticity of demand between cellophane and other wrappings.

> "If a slight decrease in the price of cellophane causes a considerable number of customers of other flexible wrappings to switch to cellophane, it would indicate that a high cross-elasticity of demand exists between them; that the products compete in the same market." 351 U.S. at 400.

Applying this test, the Court concluded that the competition between cellophane and other flexible packaging materials was sufficient to prevent cellophane from constituting a separate relevant market and that the relevant market for determining the extent of du Pont's market control was the market for flexible packaging materials. On this basis, the Court upheld the lower court's conclusion that du Pont lacked monopoly power.

In determining the relevant product market in this case, therefore, it is necessary to determine the products which compete with The News in the home delivery market. Plaintiffs argue that there are none, and that The News is so unique that it occupies a product market of its own. The News, on the other hand, contends that it competes with some 37 newspapers, as well as television and other media. Though I reject The News' attempt to define the product market in terms which include other media,[56] I accept its

[56] It is now well settled that the daily newspaper is a distinct line of commerce. See, e.g., *United States* v. *Citizen Publishing Company*, 280 F.Supp. 978, 985-987 (D. Ariz. 1968), *aff'd*, 394 U.S. 131 (1969); *United States* v. *Times Mirror Company*, 274 F.Supp. 606, 617 (C.D. Cal. 1967), *aff'd mem.*, 390 U.S. 712 (1968).

It is true that in some of the services which they provide, daily newspapers compete with radio and television stations, weekly newspapers and magazines and a wide variety of specialized publications. See generally, Markham, *Economic Analysis of Competition in the Daily Newspaper Business*, in American Newspaper Publishers Ass'n. Newspapers (1963). Cf. *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951). This does not mean, however, that all competitors of any service provided by a daily newspaper can be lumped into the same line of commerce. *United States* v. *Times Mirror Company*, supra, at 618. Cf. *United States* v. *Continental Can Co.*, 378 U.S. 441, 449 (1964); *Plastic Packaging Materials, Inc.* v. *Dow Chemical Co.*, 327 F.Supp. 213, 229 (E.D. Pa. 1971).

In this regard, Judge Ferguson's remarks in the *Times Mirror Company* case are particularly relevant:

> "The daily newspaper business is a distinct line of commerce and is a product separate and distinct from any other product. It has sufficient peculiar characteristics and uses which make it distinguishable from all other products. . . .
>
> The daily newspaper provides a cluster of services in one unique package. It provides readers with a daily written record of current events and reference information including vital statistics, public announcements, legal notices, box scores, stock market reports, weather reports, theater listings and radio and television logs. They provide more, wider and deeper coverage of all news—international, national and local—than any other medium of daily news dissemination." 274 F.Supp. at 617.

contention that it competes with numerous other newspapers because plaintiffs have failed to adduce any evidence in the record to justify any other product market selection.[57] See *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 612 (1953); *United States* v. *Chas. Pfizer & Co.*, 246 F.Supp. 464, 470 (E.D.N.Y. 1965). Plaintiffs have simply not shown that a person contemplating home delivery of The News would not consider as an alternative, home delivery of the New York Times, Newsday, the Long Island Press or any one of a number of others news-

[57] Plaintiffs introduced no evidence to negate The News' claim of high cross elasticity of demand between The News and other home delivered papers. Indeed, the record indicates that it was able to compete effectively with other home delivered papers only after its price relative to the other papers was lowered.

papers. This was clearly their burden and failure to do is fatal to this aspect of their case. *United States* v. *Chas. Pfizer & Co.*, 246 F.Supp. 464 (E.D.N.Y. 1965). Cf. *Times-Picayune Publishing Co.* v. *United States*, supra, at 626.

In any event, plaintiffs have failed to prove that The News had the requisite specific intent to monopolize. Notwithstanding the predatory nature of many of its acts, I am convinced that its primary concern was not the elimination of its competitors.

Plaintiffs' claim that The News and its franchise dealers "combined and conspired to monopolize a part of the newspaper trade" requires a separate analysis because the elements of attempted monopolization and conspiracy to monopolize differ. See *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 709 (1962); *United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1961); *United States* v. *Chas. Pfizer & Co.*, 245 F.Supp. 737, 738 (E.D.N.Y. 1965). See also, Note, 27 Geo. Wash. L. Rev. 227, 241 (1958). While attempted monopolization requires conduct imminently threatening monopolization, all that is needed to establish a conspiracy to monopolize is the act of conspiring. See *Nash* v. *United States*, 229 U.S. 373, 378 (1913). Cf. *Hyde and Schneider* v. *United States*, 225 U.S. 347, 387-88 (1912) (dissenting opinion). Thus, Section 2 prohibits any combination or conspiracy to monopolize whether it be "wholly nascent or abortive on the one hand, or successful on the other." See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 225-26 n. 59 (1940). See also, *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809-811 (1946).

For this reason, there is no necessity to consider market power in § 2 conspiracy cases. See *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 225-26 (1947); *United States* v. *Consolidated Laundries Corporation*, supra, at 573. Cf. *United States* v. *du Pont de Nemours & Co.*, 351 U.S. 377, 395 n. 23 (1956). The only inquiry is whether there has been a combination or conspiracy "to monopolize any part of the trade or commerce among the several states." See *American Tobacco Co.* v. *United States*, supra, at 789.

Since Section 2 makes it unlawful to conspire to monopolize "any part" of commerce,[58] a violation is made out if any appreciable part of interstate commerce[59] is the subject of the conspiracy. *United States* v. *Yellow Cab Co.*, supra, at 225-26; *United States* v. *Consolidated Laundries Corporation*, supra, at 573; Turner, *Antitrust Policy and the Cellophane Case*, 70 Harv. L. Rev. 281, 294, 304-305 (1956). The home delivery market for The News obviously qualifies. Cf. *Mt. Lebanon Motors, Inc.* v. *Chrysler Corporation*, 283 F.Supp. 453, 460 (W.D. Pa. 1968), *aff'd*, 417 F.2d 622 (3rd Cir. 1969). In April, 1973 some 352,000 copies of The News were home delivered daily and some 451,000 copies were home delivered on Sundays.[60] These deliveries constituted almost 20% of The News' total net sales.[61]

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[58] The phrase "any part" of commerce has "both a geographical and a distributive significance. . . . [i]t includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce. *Standard Oil Co.* v. *United States*, 221 U.S. 1, 61 (1911). Thus trade in a particular geographical area or in a particular article of commerce is sufficiently identifiable as a "part" of commerce capable of being restrained or monopolized. See *Mt. Lebanon Motors, Inc.* v. *Chrysler Corporation*, 283 F.Supp. 453, 460 (W.D. Pa. 1968), *aff'd*, 417 F.2d 622 (3rd Cir. 1965).

[59] The News does not contest the fact that it is engaged in interstate commerce within the meaning of the Sherman Act.

[60] See defendants Exhibit R and supplement thereto.

[61] Id.

Since plaintiffs have conclusively demonstrated that The News and its franchise dealers conspired to eliminate intraband competition in the home delivery market by monopolizing trade in The News,[11] they have established a conspiracy to monopolize "a part" of interstate commerce.

VII.

Plaintiffs allege that the exclusive dealing arrangement between The News and its franchise dealers violates § 3 of the Clayton Act, 15 U.S.C. § 14.[12] The defendants, on the other hand, deny this allegation and contend that the plaintiffs have no standing to challenge this provision.

The test in this Circuit for determining standing to sue in antitrust actions is whether plaintiff is able to allege and prove damage to himself resulting from the defendant's illegal act. See e.g., *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971), *reh. denied*, 401 U.S. 1014; *SCM Corp.* v. *Radio Corp. of America*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969); *Productive Inventions, Inc.* v. *Trico Products Corp.*, 224 F.2d 6[illegible] (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956).

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[11] See *Section II* (Statement of facts) and *Section IV* (Termination of plaintiffs was pursuant to an illegal agreement to restrain trade) of this opinion.

[12] Section 3 of the Clayton Act provides in pertinent part that:

> *"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods* . . . or resale within the United States . . . on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, . . . *of a competitor or competitors of the lessee or seller*, where the effect of such lease, sale or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

This requirement is entirely consistent with the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble damage action. Where there exists a plaintiff directly injured who can sue, if he desires, the public policy can be vindicated by him and it is neither necessary nor proper to extend the right to sue to those who have not actually sustained injury.

In evaluating plaintiffs' § 3 claim, the threshold question is not whether defendants violated § 3, but whether plaintiffs have been injured "by reason of" the alleged violation. *GAF Corporation* v. *Circle Floor Co., Inc.*, 463 F.2d 752, 758 (2d Cir. 1972), *petition for cert. filed*, 41 U.S.L.W. 3410 (U.S. Jan. 12, 1973) (No. 72-984)); *Billy Baxter, Inc.* v. *Coca-Cola Co.*, supra; *Carswell Trucks, Inc.* v. *International Harvester Co.*, 334 F.Supp. 1238, 1239 (S.D.N.Y. 1971).

Though plaintiffs state that the merits of their § 3 claim is "too obvious to document", I find it difficult to see how any economic loss suffered by them can be attributed to the exclusive dealing clause. If the franchise dealers were authorized to handle other newspapers, the route dealers would face additional competition. However, the franchise agreement forecloses this possibility and leaves The News' competitors little choice as a practical matter but to employ plaintiffs to distribute their papers. The net effect of the clause is to limit plaintiffs' competition in the home delivery market. Therefore, whatever impact the exclusive dealing provision has upon the franchise dealers, competing newspapers or potential competitors of The News, it can only benefit plaintiffs. Accordingly, I find as a matter of law that the provision does not injure plaintiffs in their business or property and that they have no standing to contest its validity.

However, even if they had standing to sue they would be unable to make out a violation of § 3 on this record.

Exclusive dealing contracts are not illegal *per se.*, *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 333 (1961). The Court must examine the relevant facts and circumstances surrounding the challenged conduct to determine whether they have a prohibited effect i.e., to substantially lessen competition or a tendency to create a monopoly. See *Chicago Bd. of Trade* v. *United States*, 246 U.S. 231 (1918); *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911).

This normally requires consideration of (1) the product market or line of commerce and the geographic market or area of effective competition, and (2) the impact of the arrangement on competition. *Tampa Electric Co.* v. *Nashville Coal Co.*, supra, at 327; *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957); *Standard Oil of California* v. *United States*, 337 U.S. 293, 299 n. 5 (1949).

In *Tampa*, supra, the Court held that for purposes of analyzing an exclusive dealing agreement under § 3, the relevant market is not the supplier's own market, but the broader area in which his competitors operate. This plaintiffs have completely failed to identify, a shortcoming which would in itself require dismissal. See *United States* v. *E. I. du Pont de Nemours Co.*, supra, at 593; *United States* v. *Chas. Pfizer & Co.*, 246 F.Supp. 464 (E.D.N.Y. 1965). However, since it is clear that the relevant market here encompasses at least the newspaper home delivery market in the New York City Metropolitan area,[44] *Mytinger &*

[44] For purposes of analyzing plaintiffs' § 3 claim, I have defined the relevant market to be the newspaper home delivery market in the New York Metropolitan area. This, however, is an extremely restrictive definition, see *Mytinger & Casselberry, Inc.* v. *F.T.C.*, supra, at 542 (dissenting opinion), and there is substantial evidence in the record which would support a finding that the relevant

Casselberry, Inc. v. *F.T.C.*, 301 F.2d 534 (D.D.C. 1962); Cf. *United States* v. *Columbia Steel Co.*, 334 U.S. 495 (1948), I have decided to overlook this defect.

Once the area of effective competition has been defined, an analysis must be made to determine if the effect of the arrangement "may be to substantially lessen competition or to create a monopoly" in this market. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 328 (1962); *Tampa Electric Co.* v. *Nashville Coal Co.*, supra, at 328 (1961). The crucial inquiry is whether the opportunity for other competitors to enter or remain in the market has been significantly limited, *Tampa Electric Co.* v. *Nashville Coal Co.*, supra, at 328; *Standard Oil Co. of California* v. *United States*, supra; see also, *Att'y Gen. Nat'l Comm. Antitrust Rep.* 146 (1955), taking into account: "[t]he relative strength of the parties, the proportionate volume of commerce in the relevant market area, and the probable immediate and future effects which preemption of that share of the market might have on effective competition." *Tampa Electric Co.* v. *Nashville Coal Co.*, supra, at 329.

Plaintiffs adduced little to indicate the probable anticompetitive effects of the exclusive dealing arrangement. This, assuming standing, is clearly their burden, and unless it is met, the court cannot give appropriate scrutiny to the economic ramifications, including possible justification. *Susser* v. *Carvel Corp.*, 332 F.2d 505, 516 (2d Cir. 1964), *cert. granted*, 379 U.S. 885 (1964), *cert. dismissed*

market is not nearly so circumscribed. Indeed, it may well be that other newspaper outlets effectively compete with home delivery dealers for the daily newspaper trade and that the mode of retailing is not a meaningful basis for distinguishing newspaper outlets. For purposes of § 3, see *Tampa Electric* v. *Nashville Coal Co.*, supra, at 330-333; *Cornwell Quality Tools Co.* v. *C.T.S. Company*, 446 F.2d 825, 830 (9th Cir.), *cert. denied*, 404 U.S. 1049 (1971).

as improvidently granted, 381 U.S. 125 (1965).[46] Here, there has been no showing that interbrand competition has been significantly limited or that entrance into the newspaper publishing market has been foreclosed. Instead, the record indicates that existing newspapers have remained in the market and successfully competed with The News.

Plaintiffs rely exclusively on *Standard Oil Co. of Calif.* v. *United States, supra.* There, the Supreme Court held illegal *Standard's* exclusive dealing contracts with sixteen percent of the independent dealers in a seven-state area involving 6.7 percent of the total gallonage sold in the area. In concluding that the contracts foreclosed competition in a substantial share of the relevant market, the Court applied what has become known as the "quantitative substantiality" test and refused to consider whether the contracts had in fact harmed competition or whether they were justified on economic grounds. The Court held that "the qualifying clause of § 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected" and that it is not necessary to demonstrate "that competitive activity has actually diminished or probably will diminish." 337 U.S. at 314, 299.

However, in *Tampa Electric Co.* v. *Nashville Coal Co.,* supra, the Court departed from the rigorous and inflexible rule it had established in *Standard Oil* and erected

[46] In *Susser,* the plaintiffs failed to introduce evidence of the anticompetitive effects of the exclusive dealing arrangement in question. Chief Judge Lumbard commented that "[i]nstead of introducing evidence to establish the economic effects of the Carvel franchise structure, [plaintiffs] merely protest that anti-competitive effects may be inferred solely from the existence of such a network of exclusive dealerships. But the whole tenor of Tampa Electric does not permit adherence to such a strict standard of legality." 332 F.2d at 516.

criteria which demand close scrutiny of the economic ramifications of an exclusive dealing arrangement in order to determine its probable anti-competitive effects.[46] See *Susser* v. *Carvel Corporation,* supra, at 516; *United States* v. *Chas. Pfizer & Co.,* supra, at 471; *Curly's Dairy, Inc.* v. *Dairy Cooperative Association,* 202 F.Supp. 481, 484-485 (D. Ore. 1962); Bok, *The Tampa Electric Case and the Problem of Exclusive Arrangements Under the Clayton Act,* 1961 Sup. Ct. Rev. 281-285. Neither comparative quantitative substantiality (i.e., the market share foreclosed) nor absolute quantitative substantiality (i.e., the dollar volume foreclosed) is controlling. *Curly's Dairy, Inc.* v. *Dairy Cooperative Association,* supra. Instead, the test is whether the system of challenged exclusive arrangements in fact forecloses competitors from a substantial market. *Att'y Gen. Nat'l Comm. Antitrust Rep.* 146 (1955).

Any new newspaper can readily enter the market through the independent route dealers who do not have exclusive dealing arrangements or via a carrier boy system as did Newsday, The Long Island Press and The Suffolk Sun. The News' competitors have ready access to a sufficient number of outlets to permit the effective marketing of their products.

It follows, therefore, that The News' exclusive dealing arrangements do not foreclose The News' competitors from

[46] See discussion at page 5, supra. The Court stated that:

"• • • To determine substantiality in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which preemption of that share of the market might have on effective competition therein. It follows that a mere showing that the contract itself involves a substantial number of dollars is ordinarily of little consequence."

a substantial portion of the market and that plaintiffs' Section 3 claim must be dismissed.

VIII.

Plaintiffs finally contend that The News discriminated "between different purchasers of commodities of like grade and quality" in violation of §§ 2(a), 2(c), 2(d) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §§ 13(a), 13(c), 13(d) and 13(e), and that the franchise dealers violated § 2(f) of the Act, 15 U.S.C. § 13(f), by receiving and accepting preferential treatment from The News.

Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, is directed at preventing certain types of discrimination by sellers in interstate commerce. See generally, Rowe, *Price Discrimination Under the Robinson-Patman Act.*[67] However, its jurisdictional requirements are far narrower than the "effect on commerce" test of the

[67] Section 2(a) prohibits discriminatory pricing under certain circumstances by "any person engaged in commerce, in the course of such commerce . . . where either or any of the purchases involved in such discrimination are in commerce . . ." Section 2(f) is a corollary to § 2(a) and makes it unlawful "knowingly to induce or receive" such a price discrimination.

Sections 2(c), 2(d) and 2(e) make unlawful various business practices other than price discrimination. Section 2(c) outlaws the payment or receipt of commissions or brokerage allowances "except for services rendered." Section 2(d) makes it unlawful for a supplier to grant advertising or other sales promotional allowances to one "customer" who resells the supplier's "products or commodities" unless the allowances are "available on proportionally equal terms to all other customers competing in the distribution of such products or commodities." Section 2(e) makes it unlawful for a supplier to furnish services to one purchaser which are "not accorded to all purchasers on proportionally equal terms."

Sherman Act."[68] See *Lehrman* v. *Gulf Oil Corp.*, 464 F.2d 26, 37 (5th Cir. 1972), *cert. denied*, —— U.S. —— (1973); *Cliff Food Stores, Inc.* v. *Kroger*, 417 F.2d 203, 208 (5th Cir. 1969); *Willard Dairy Corp.* v. *National Dairy Prods. Corp.*, 309 F.2d 943, 946 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963); *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.*, 287 F.2d 265, 267 (7th Cir. 1961). It specifically requires that the discriminator be "engaged in commerce", that the discrimination be "in the course of such commerce", and that "either or any of the purchases involved in such discrimination are in commerce . . ."[69] See Rowe, *Price Discrimination Under the Robinson-Patman Act* 3-23 (1962); Note 86 Harv. L. Rev. 765, 769 (1973).

[68] In *Hiram Walker, Inc.* v. *A & S Tropical, Inc.*, 407 F.2d 4 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969), the Court noted that:

> "In an action brought under the Robinson-Patman Act it is necessary to allege and prove that the transactions complained of are actually in interstate commerce, while in actions brought under the Sherman Anti-Trust Act it is sufficient if the transactions complained of are shown to have affected interstate commerce." 407 F.2d at 8.

[69] The quoted language is from § 2(a), 15 U.S.C. § 13(a) which provides in relevant part:

> "(a) It shall be unlawful for any person engaged in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, *where either or any of the purchases involved in such discrimination are in commerce,* where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce . . ." (Emphasis added).

It qualifies each of the pertinent sections except § 2(e) from which it was inadvertently omitted. See *Elizabeth Arden, Inc.* v. *Federal Trade Commission*, 156 F.2d 132 (2d Cir. 1946); *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F.2d 988 (8th Cir. 1945); Callman, *Unfair Competition Trademarks and Monopolies*, § 28.1 (e) (1971).

The requirement that "either or any of the purchases involved [be] in commerce" has consistently been interpreted to mean that the Act is applicable only where "at least one of the two transactions . . . cross a state line." [10] *Walker Oil Co.* v. *Hudson Oil Co.*, 414 F.2d 588, 589-90 (5th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970). See also, *Anaya* v. *Las Cruces Sun News*, 455 F.2d 670 (10th Cir. 1972); *Belliston* v. *Texaco, Inc.*, 455 F.2d 175 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972); *Hiram Walker, Inc.* v. *A & S Tropical, Inc.*, 407 F.2d 4 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969); *Willard Dairy Corp.* v. *National Dairy Products Corp.*, 309 F.2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963). But see *Littlejohn* v. *Shell Oil Co.*, 456 F.2d 225 (5th Cir. 1972), *petition for rehearing en banc granted*, 470 F.2d 997 (1973).

To prevail on their Robinson-Patman claims, plaintiffs must demonstrate, inter alia,: (1) that The News is engaged in commerce; (2) that, in the course of such commerce, it has discriminated between different purchasers of The News; and (3) that the discriminatory transactions took place "in commerce" (i.e., crossed state lines). This is an insurmountable burden on the proof in this case. Plaintiffs Hand, Shank, Fox, Greenberg and Holman are the only plaintiffs who compete with franchise dealers and purchase from The News. Therefore, they are the only "purchasers" who have been denied equal treatment. See Callman, *Unfair Competition, Trademarks and Monopolies* § 28.1(a) (3rd Ed. 1971). Since all of their routes are in

[10] In *Cliff Food Stores, Inc.* v. *Kroger, Inc.*, supra, the Court held that ". . . the critical language in the statute has been repeatedly construed to mean that the seller must not only be engaged in interstate commerce, but one of the discriminatory sales must also be in interstate commerce." 417 F.2d at 208.

New York where The News is published, sold at wholesale to their competitors and resold to home delivery subscribers, they have failed to prove that any discriminatory transactions took place "in commerce". Accordingly, plaintiffs' Robinson-Patman claims are dismissed.

The above shall constitute my findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

The parties are directed to prepare a judgment incorporating these findings of fact and conclusions of law and specifying an appropriate form of injunctive relief.

So ORDERED.

Dated: June 29, 1973

ARNOLD BAUMAN
U. S. D. J.

APPENDIX B.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 423, 424, 425—September Term, 1974.

(Argued March 12, 1975 Decided July 23, 1975.)

Docket Nos. 73-2648, 73-2668, 74-1257

CHARLES W. BOWEN, JR., d/b/a SUBURBIA NEWS DELIVERY SERVICE, RICHARD CARTABUKE, d/b/a R. CARTABUKE NEWS DEL., JOSEPH DITTA and JOSEPH FAILLA, DELLA DAVIS, SOL L. GOLDBERG, d/b/a PLAINVIEW NEWS DELIVERY, ROBERT C. HARDING, d/b/a SOUTH SHORE HOME DELIVERY and as Assignee of DONALD F. HARDING, THEODORE MARKOWITZ, d/b/a A.M.F. NEWSPAPER DELIVERY SERVICE, FRANK MIRRO and EMANUAL MIRRO, d/b/a FRANDEL NEWS SERVICE, JACK POSEROW as Assignee of VALLEY STREAM NEWS SERVICE, INC., BENJAMIN and FLORENCE ROSENBLUM, d/b/a STEVANS NEWS SERVICE, HOWARD B. SCHULZ and MARGARET SCHULZ, d/b/a NEWSDEALER, KENNETH SWEENEY, JOHN KAHRS, d/b/a NEW YORK NEWSPAPER DELIVERY, FLORAL PARK NEWS DELIVERY, INC., et al.,

Plaintiffs-Appellees,

—against—

NEW YORK NEWS, INC., JACK UNDERWOOD, ROBERT O. SULLIVAN, ANTHONY CARANZARO, DAVID AUERBACH, DONALD A. NIZEN, GABRIEL LEWANDER, F. M. FLYNN, WINFRED JAMES, JOHN ERWIN, also known as JOHN IRWIN, SY HECHT, ERNEST SMITH, JOSEPH CONWAY, P. PASTORELLI, J. PASTORELLI, BERNARD F. SMITH, HOWARD KENT, E.

DE BELLA, MRS. ARTHUR C. ELLERMAN, RAYMOND LEDDA, MICHAEL LEPORE, VICTORE LEPORE, ARNOLD BLUME, WALDO RODRIGUEZ, E. CAPAZZI, RONALD PARKHURST, W. JOUBERT, et al.,

Defendants-Appellants.

Before:

MOORE, FEINBERG and MANSFIELD,

Circuit Judges.

Appeal by the defendants, the New York News, and its franchise dealers, from a judgment of the United States District Court for the Southern District of New York, Arnold Bauman, *Judge,* finding that defendants' establishment and operation of a newspaper home delivery system under which defendants' paper, The Daily News, is distributed by franchise dealers, each of whom distributes it only in an exclusive territory at prices established by defendants, with sales to plaintiff independent home newspaper dealers being terminated unless they became franchise dealers, violated §§1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2.

Affirmed in part and reversed in part.

W. P. HINDMAN, Esq., New York, N.Y. (Townley, Updike, Carter & Rodgers, New York, N.Y., of counsel), *for Defendants-Appellants New York News, Inc., Jack Underwood, Robert O'Sullivan, Anthony Catanzaro, David Auerbach, Donald A. Nizen, Gabriel Lewander, F. M. Flynn, Winfred James, John Erwin, also known as John Irwin, Sy Hecht, Ernest Smith, Joseph Conway, P. Pastorelli,*

J. Pastorelli, Bernard F. Smith, Howard Kent, E. DeBella, Mrs. Arthur C. Ellerman, Raymond Ledda, Arnold Blume, Waldo Rodriguez, E. Capazzi, Ronald Parkhurst, W. Joubert, C. McNally, J. Raben, Charles Ashdown, J. Occhino, R. Carroll, B. Smith, and "John" Reilly (whose first name is presently unknown).

NICHOLAS L. COCH, Esq., New York, N.Y., *for Defendants-Appellants Lepore.*

HERBERT MONTE LEVY, Esq., New York, N.Y., *for Plaintiffs-Appellees.*

MANSFIELD, *Circuit Judge:*

This action was brought in the Southern District of New York by 30 independent home newspaper delivery dealers against New York News, Inc. ("The News" herein), publisher of The Daily News and The Sunday News ("News" herein), various employees of The News and franchise dealers of the News, seeking injunctive relief and damages under §§4 and 16 of the Clayton Act, 15 U.S.C. §§15, 26.[1]

1 Sections 4 and 16 of the Clayton Act provide in pertinent part:

"§15. *Suits by persons injured; amount of recovery*

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. §15.

"§26. *Injunctive relief for private parties; exception*

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and

Plaintiffs alleged that The News and its franchise dealers engaged in a conspiracy in restraint of trade in violation of §1 of the Sherman Act, 15 U.S.C. §1, when, in early 1966, the News established in certain parts of Long Island a system of home newspaper delivery whereby dealers with the aid of carrier boys would distribute only the News in exclusively assigned territories. These franchise dealers, distributing through carrier boys, sold the newspapers at prices fixed by The News. Prior to institution of this system, the News had been delivered in many areas by the plaintiffs as independent "route dealers," and by adult carriers who handled various other publications and delivered them primarily by motor vehicle. Following introduction of the franchise dealer system, The News ceased selling newspapers to most competing independent route dealers.

The trial judge, after a lengthy trial, rejected a defense that the agreement's provision for stipulated resale prices was protected from antitrust attack by the federal Fair Trade law, 15 U.S.C. §45(a)(2) (the McGuire Act) and by New York's Feld-Crawford Act, N.Y. Gen. Bus. L. §§369-a, *et seq.*, holding that the agreements constituted an illegal conspiracy to fix prices. He further found that The News' refusal to deal with the plaintiffs, and certain actions taken by The News and its franchise dealers to

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principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission." 15 U.S.C. §26.

restrict or prevent access by independent route dealers to copies of The Daily News, were taken pursuant to the illegal resale price conspiracy, and that the latter activities also constituted a conspiracy to monopolize intra-brand competition in the home delivery market of the News. See 366 F. Supp. 651 (S.D.N.Y. 1973).[2] Since we hold that the Fair Trade laws did protect the stipulated price agreements between The News and its franchise dealers, we reverse Judge Bauman's finding of an illegal conspiracy to fix prices.[3] We affirm, however, his finding

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2 Judge Bauman rejected plaintiffs' contention that the agreement between The News and its franchise dealers to the effect that the dealers would handle only the News violates §3 of the Clayton Act, 15 U.S.C. §14, on the ground that plaintiffs had no standing to challenge this provision. See p. 5053, *infra*. Plaintiffs do not appeal this determination.

The trial judge further rejected a claim by plaintiffs that The News violated §2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §13, by selling wholesale copies of The News to the franchise dealers at rates preferential to those offered to the independent route dealers. Plaintiffs' appeal of this determination does not merit discussion since it is clear, as Judge Bauman held, 366 F. Supp. at 680-81 & n.69, that plaintiffs never alleged or proved the jurisdictional requirement of §2 that "either or any of the purchases involved in such discrimination [be] in commerce," a requirement which has been interpreted to mean that "§2(a) applies only where 'at least one of the two transactions which, when compared, generate a discrimination . . . [that] cross[es] a state line'" *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 200 (1974), *quoting Hiram Walker, Inc.* v. *A & S Tropical, Inc.*, 407 F.2d 4, 9 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969); see *Littlejohn* v. *Shell Oil Co.*, 483 F.2d 1140, 1144 (5th Cir.) (en banc), *cert. denied*, 414 U.S. 1116 (1973); *Willard Dairy Corp.* v. *National Dairy Prods. Corp.*, 309 F.2d 943, 946 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963); *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.*, 287 F.2d 265, 267 (7th Cir. 1961).

3 In view of the fact that on May 5, 1975, the Governor of New York signed into law a bill repealing New York's Feld-Crawford Act it may be argued that our decision has been mooted, requiring affirmance of the injunctive relief granted by the district court. The state's action may well lead The News to reconsider its marketing and distribution system. However, the repeal does not become effective until August 5, 1975, and there remains the claim for damages, which turns upon the legality of The News' pre-repeal conduct.

of a conspiracy to restrain trade by restricting access of independent dealers to copies of the News, modify the award of injunctive relief as hereafter stated, and remand for determination of damages pursuant to the agreement of the parties that this determination would await a finding of liability.

The adoption of the system of home delivery by franchise dealers, the legality of which is at issue, was prompted by a decline in distribution in the early 1960's suffered by The News, which by the time of this lawsuit had the largest circulation of any newspaper in the United States. This decline was largely attributable to a decline in sales of an evening edition published by The News, and by the pronounced shift in population and in commercial enterprises, which led to a shift of advertising markets from city to suburbs. Unfortunately for The News, its efforts to compete in this suburban market met with limited success. Despite initiation of specialized suburban zone sections, which carried regional advertising and local news, between 1960 and 1966 the circulation of the home-delivered News in Nassau and Suffolk Counties (suburban Long Island) increased by less than 2,400 copies, failing to keep up with dramatic population gains in the area of about 350,000 persons and equally dramatic increases in the circulation in the Long Island market of The News' major competitors, Newsday and the Long Island Press.

Before 1966 the News was home-delivered on Long Island by the independent route dealers. The route dealers purchased various publications wholesale and resold them to home delivery subscribers within defined territories, the boundaries of which each route dealer respected. The News concluded that use of the independent route dealers was an impediment to its effort to substantially increase circulation of its newspaper in Long Island. After testing in 1965, The News determined to change its

mode of home distribution in some parts of New York City and much of Long Island to the system of franchise dealers and carrier boys. The dealers who participated in this program signed "Carrier Agreements" with The News which generally provided that the dealer would be assigned an exclusive territory, that he would deliver only the News, and that the prices charged to customers and to carrier boys engaged in delivery would not exceed maximum prices set by The News.

On initiation of the new program late in 1965 and early in 1966, The News offered to some of the plaintiff independent route dealers the opportunity to become franchise dealers. They were advised that franchise dealers would handle home delivery of the News within their territories on an exclusive basis, and that if the independent route dealers did not agree to the franchise contract, supplies of the News to them would be terminated. While some independent route dealers did choose to become News franchise dealers, none of the plaintiffs did so and 16 of the plaintiffs were thereafter cut off. Meanwhile, The News filled out its franchise dealer ranks from other sources, and subsidized the early stages of the organization of franchise dealerships.

Terminated independent route dealers did not cease in their efforts to service their customers with copies of the News even though they could no longer obtain the newspapers directly from the publisher. They sought to purchase copies from other newsdealers and local outlets, but met substantial difficulty in finding anyone who would sell to them on a continuing basis. Many plaintiffs thus had to travel long distances to obtain copies of the News, usually to Brooklyn or Queens, and were forced to pay close to home delivery price. Even then, many route dealers had difficulty obtaining sufficient copies to service their cus-

tomers, and could obtain only early editions and editions which did not contain the local Long Island news section.

In addition, the trial court found on evidence hotly disputed by appellants that employees of The News engaged with the franchise dealers in a campaign of surveillance and harassment to root out and eliminate the sources of supply of the competing independent route dealers. The trial judge found that some retail dealers who sold to the route dealers were threatened with termination, and in at least one instance were cut off by The News.

I. *Application of the Fair Trade Laws to the Franchise Agreements*

The district court's opinion relies heavily upon the conclusion that the agreements between the franchise dealers and The News amounted to an illegal conspiracy to fix maximum resale prices. There is no doubt that this agreement would be per se illegal under §1 of the Sherman Act unless protected by the Fair Trade laws, *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911). The "Carrier Agreement" clearly states that "the parties desire to avail themselves of the fair trade acts now and hereafter in effect." The issue is whether they succeeded.

In amending the Sherman Act §1, the Miller-Tydings Act of 1937, 50 Stat. 693 (1937), provided that vertical contracts requiring resale price maintenance would be lawful in states which permitted such contracts, 15 U.S.C. §1. Following the Court's decision in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951), which held that the Miller-Tydings Act did not permit enforcement of a resale price maintenance contract against nonsigning

retailers, Congress passed the McGuire Act, 66 Stat. 631 (1952), amending §5(a) of the Federal Trade Commission Act, 15 U.S.C. §45(a), by adding language making clear that if the state statutory scheme permitted enforcement of resale price maintenance agreements against nonsigners these contracts and their enforcement would not constitute violations of the antitrust laws.[4] The McGuire Act, like the Miller-Tydings Act before it, see 15 U.S.C. §1, made clear that it intended to permit only vertical and not horizontal price maintenance agreements, see 15 U.S.C. §45(a)(5).[5]

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4 15 U.S.C. §45(a) provides in pertinent part:

"(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

"(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

"(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce."

5 See p. 5042, *infra*.

Since the McGuire Act protects only those resale price maintenance contracts which are lawful under state law, Judge Bauman properly began analysis of the Fair Trade problems here by determining whether the contracts complied with New York's Feld-Crawford Act, N.Y. Gen. Bus. L. §§369-a, *et seq.* Paralleling much of the federal law, see note 4, *supra*, the New York statute provides in part that

> "No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the state of New York by reason of any of the following provisions which may be contained in such contracts:
>
> (a) That the buyer will not resell such commodity except at the price stipulated by the vendor;
>
> (b) That the vendee or producer require any dealer to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee."

The Carrier Agreement between The News and its franchise dealers provides that the franchise dealer will "supervise and direct the delivery and resale of copies of the Daily and Sunday News to . . . regular subscribers in his territory at no more than the regular established home delivery price." Plaintiffs first challenge this agreement on the grounds that the News is not in free and open competition with commodities of the same general class, and that The News' purported control over the resale price

also includes control of the service charge for home delivery.

We agree with the trial judge, for the reasons stated in his opinion, that the News is in free and open competition with other metropolitan and local newspapers and that the provision as to delivery service does not limit The News' ability to control resale price, 366 F. Supp. at 661-62. Similarly, we agree with his conclusion that the Feld-Crawford and McGuire Acts authorize the setting of maximum resale prices, and not merely minimum or fixed prices as plaintiffs urge. See 366 F. Supp. at 663-64. Section 369(a)(1) of the Feld-Crawford Act refers only to "stipulated" prices while the McGuire Act refers to "minimum or stipulated" prices. 15 U.S.C. §45(a)(2). It has been held in New York that the term "stipulated" contemplates an agreement "by which the buyer agrees not to sell below a stated price as well as . . . a contract by which the buyer agrees to sell neither above nor below that price. . . ." *General Electric Co.* v. *S. Klein-on-the-Square, Inc.*, 121 N.Y.S.2d 37, 47 (Sup. Ct. 1953). In setting a lower bound the manufacturer exercises only part of his authority to prevent sales below the minimum designated price. See *Mead Johnson & Co.* v. *West Chester Discount, Health & Vitamin Center, Inc.*, 212 F. Supp. 310, 313 (E.D. Pa. 1962). No reason exists why the manufacturer similarly may not exercise only the other half of his power and restrict only maximum resale prices. See also *Schwegmann Bros.* v. *Calvert Distillers Corp., supra,* 341 U.S. at 388. Indeed, although horizontal restraints on maximum prices are illegal per se, *Albrecht* v. *Herald Co., supra,* limitations on maximum resale prices are less restrictive of competition than minimum price restraints, *id.* at 159 (Harlan, *J.*, dissenting). Since Congress and the New York legislature determined to permit the more restrictive vertical minimum

price restraints, no straining is necessary to conclude that maximum resale prices are also permissible.

Plaintiffs' final contention is that the franchise agreement is unprotected by the McGuire Act because it is an agreement "between wholesalers," precluded from antitrust immunity by paragraph 5 of that statute which provides:

> "Nothing contained in paragraph (2) of this subsection [legalizing agreements prescribing stipulated resale prices, see note 4, *supra*] shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other." 15 U.S.C. §45(a)(5).

The Feld-Crawford Act similarly specifies that "[t]his article shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices." N.Y. Gen. Bus. L. §369-c. Paragraph 5 of the McGuire Act was construed by the Supreme Court in *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305 (1956), to bar an antitrust exemption for a drug manufacturer which conducted a major wholesale operation and which entered Fair Trade agreements relating to its drug products with independent wholesalers who were competitors of its wholesale operation. The Court held that the agreements were contracts "between wholesalers," refusing to accept an argument that McKesson acted "only as a manufacturer" in entering into them. 351 U.S. at 312. In *Janel Sales Corp.* v. *Lanvin Parfums, Inc.*, 396 F.2d 398 (2d Cir.), *cert. denied*, 393 U.S. 938 (1968), we applied

McKesson to prohibit enforcement by a perfume manufacturer of a resale price maintenance agreement against a perfume retailer where the evidence indicated that the manufacturer was also engaged in retail operations, holding that the contract was prohibited as one "between retailers" even though there was no showing that the retailers were in actual competition with each other. 396 F.2d at 403. It plainly follows from this analysis that an agreement "between wholesalers" would also be illegal despite the absence of actual competition between the parties.

The key question before us, therefore, is whether the agreement between The News and the franchise dealers was one "between wholesalers." The trial judge found that The News is a "wholesaler," since its business is selling in gross to various retail dealers and independent wholesalers, and that the franchise dealers are also "wholesalers" because they resell in bulk to their carrier boys, whom the judge considered to be "retailers." The analytical foundation of the district court's judgment lies in this latter finding, i.e., that the "franchise dealers also function as wholesalers in selling to their carrier boys." 366 F. Supp. at 666. We hold this conclusion to be erroneous.

It is true that the language used in The News' Carrier Agreements lends facial support to the view that the franchise dealer was to act as an intermediate purchaser, buying from The News and reselling to carrier boys, who would then make the ultimate resales to home subscribers. For instance, the Agreement refers to "resale" by the delivery boy of papers and provides that the franchise dealer may not "charge" the boy more than a fixed "wholesale rate." Indeed, The News, apparently ignorant of the significance of *McKesson*, also sought to invoke the McGuire Act by continuing to describe itself as selling to

the franchise dealers as "wholesalers" for resale to the delivery boys, and its witnesses appear to have accepted this characterization of affairs. Thus The News' Circulation Director testified that the agreements enabled The News to "fix[] the price at which the boy sells to the ultimate consumer and . . . fix[] the price at which the franchised dealer sells to the boy." He further characterized the franchise dealer distribution system: "The News distributes to the franchised dealer, the franchised dealer distributes to the boy, and the boy distributes to the home."

The characterizations used by parties in their agreements, however, while a factor to be considered, are not binding on the court, which must look to the substance rather than to the parties' formal description of their relationship in determining whether there has been compliance with the McGuire Act. The words "wholesaler" and "retailer," as used in that Act, are to be understood "in their normal and customary manner," *United States* v. *McKesson & Robbins, Inc., supra,* 351 U.S. at 312, *quoting Schwegmann Bros.* v. *Calvert Distillers Corp., supra,* 341 U.S. at 388. As we emphasized in *Janel Sales Corp.,* the "customary" meaning of "retailer" requires inquiry into the normal indicia of a retail sale such as "actual size of the sale, the dollar value of the sale, and the number of similar sales that are made," 396 F.2d at 403, and whether or not the purchaser is buying for his own personal needs, *Parke, Davis & Co.* v. *Janel Sales Corp.,* 328 F.2d 105, 106 (2d Cir.), *cert. denied,* 379 U.S. 835 (1964). Similarly, in determining whether a party to a Fair Trade Agreement is a "wholesaler," we must look to whether the franchisee buys for the purpose of reselling in gross and whether the persons to whom he sells actually resell at retail.

Judged by these standards, the franchise dealer here performs no true "wholesale" functions. Unlike the nor-

mal wholesaler, who buys in bulk and distributes to a broad spectrum of independent merchants who then resell for their own profit, here the Carrier Agreement clearly contemplates "sales" only to home subscribers. Although Paragraph 5 of the McGuire Act prohibits Fair Trade agreements between wholesalers, its thrust is the prevention of price fixing between those in competition with sellers at the same functional level. *United States* v. *McKesson & Robbins, Inc., supra*, 351 U.S. at 313. Even accepting the characterization of the transactions here involved as "resales" by the franchise dealers to the delivery boys, the distribution was *exclusively* through the franchise dealers to the delivery boys, so that The News, however its function is described, would never be engaged in selling directly to delivery boys or to home subscribers and thus would not have any occasion to agree with competing sellers upon the resale price. It would therefore be anomalous to classify as "wholesalers" buyers whose resales are solely to a narrow group of this nature.[6]

Without denigrating the importance of the home-delivery function performed by the 12-15 year old carrier boys, to describe their role as that of "retailers" is to distort and to inflate it beyond its obvious limitations. They are simply boys engaged by the franchise dealer to make deliveries of the News to home subscribers on given routes at a fixed

6 As noted further on in this opinion, the franchise dealers may not legally be restricted to selling to the carrier boys or to their home subscribers. See pp. 5057-5058, *infra*. The Carrier Agreement purports, however, to fix prices only on resales to "regular subscribers in his territory" and to carrier boys, and not on sales to anyone else. The fact that the franchise dealer may be a wholesaler in making sales to other persons therefore does not make the present Fair Trade agreement illegal under Paragraph 5 of the McGuire Act, since the Carrier Agreement does not fix prices on sales by the franchise dealer which may place him in competition with The News, see *Janel Sales Corp.* v. *Lanvin Parfums, Inc.*, 396 F.2d 398, 404-05 (2d Cir.), *cert. denied*, 393 U.S. 938 (1968).

compensation per copy, with no real risk and no chance of realizing independent profits. The selling function, including advertising, sampling and solicitation of prospective home subscribers, is performed almost entirely by The News and by the franchise dealers rather than by the boys. The boys, moreover, are directly under the supervision and management of the franchise dealer; indeed, the agreement does not require the use of carrier boys at all. The boy hardly has a proprietary interest in the subscribers or his route. Rather it is the franchise dealer who is required to prepare and maintain lists of subscribers in his territory and also "the names, addresses and telephone numbers of all *carrier boys, agents, and employees* employed in said territory." Likewise, it is the franchise dealer, not the boys, who is responsible for investigating all complaints and subscription stoppages, filing a report to The News within a week, and who is to be paid at a specified rate for each new home delivery subscription "obtained through the efforts of the Carrier or his agents and employees." Of course, franchise dealers encouraged the carrier boys to obtain new subscriptions, in their route areas, assured them that their efforts would be rewarded by retaining the new subscriptions on their routes, and warned that stop orders on their routes would decrease their income. But this hardly establishes an independent retail function for the boys, since their profits remained limited to the established rate per delivered paper, and ultimate responsibility for subscriptions lay with the franchise dealer. While the franchise agreement did not specifically remove from the carrier boys the risk of loss should a subscriber fail to pay, the boys did not in fact sell for their own risk and account. There was no evidence that boys had sustained any losses on account of delinquent subscribers. On the contrary, there was evidence that at least one dealer re-

imbursed his boys after the subscriber failed to pay, hardly an unexpected practice.

The News urges us to go further and hold that the franchise dealers were not independent "dealers" at all, but rather its employees or agents engaged to carry out a delivery function. In that event all action taken by The News would be unilateral, and no "conspiracy" could be found.[7] However, we reject the contention that the franchise dealers were mere employees.

Aside from the fact that the Carrier Agreement itself provided "that the Carrier is and shall remain an independent contractor and not an employee or agent of The News," the Carrier, although not a "wholesaler," possesses too many attributes of independence in his relationship to others to be classified as an employee. The Carrier is given sole discretion to hire, discharge and supervise those engaged by him to carry out his delivery function, and sole discretion to determine the manner in which collections and deliveries are to be made. Significantly, the Carrier "will not . . . have the right to return at cost unsold copies of the Daily or Sunday News."[8] Moreover, the subscribers

7 The only basis for finding a violation of the antitrust laws based on the unilateral acts of The News was plaintiffs' assertion of an "attempt to monopolize" by The News. Sherman Act §2, 15 U.S.C. §2. The trial judge rejected this claim since there was no showing by the plaintiffs that this alleged attempt, even if successful, would accomplish monopolization or create a dangerous probability of it. 366 F. Supp. at 673-76. *Lorain Journal* v. *United States*, 342 U.S. 143, 153 (1951); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 785 (1946). Plaintiffs do not appeal this determination, which in any event appears correct in view of evidence that The News competes with numerous other daily newspapers in the New York City metropolitan area, and that The News in no way threatened to dominate this market.

8 The News urges that this clause was meaningless, since the franchise dealer was to buy only enough copies to service the number of home subscribers in his territory, which he knew in advance, and thus he could have "unsold copies" only if he made a mathematical error. Apart from the anomaly of The News urging that a clause of its own contract

in a franchise dealer's territory quite clearly "belong" to him. In the event the Carrier Agreement is terminated, the franchise dealer agrees to "offer to The News the right of first refusal to purchase his subscription list" at a specified rate. The franchise dealer is entitled to sell this list to another person in the event The News declines this offer. In view of these contractual arrangements, The News' assertion that it, and not the franchise dealer, maintained the actual subscriber lists and could unilaterally remove subscribers from a dealer's territory if the dealer was compensated therefor, are entitled to little weight. The record clearly supports the district court's conclusion that, when papers were sold to the franchise dealer, The News was dealing with an independent operator.[9]

is essentially surplusage, its argument here is wholly inconsistent with its argument that the Carrier Agreement does not in fact limit franchise dealers to sales to home subscribers. Whichever position is correct, we must conclude that this clause was intended to cast some risk, although relatively slight, on the franchise dealer.

9 In support of its contention that the franchise dealers are not independent contractors but its employees, The News relies upon the National Labor Relations Board's decision to that effect in *News Syndicate Co., Inc.*, 164 N.L.R.B. 422, 65 L.R.R.M. 1104 (1967), where the Board held that the franchise dealers should be treated as a separate bargaining unit. However, that decision was handed down at an early period of the franchise system and with limited evidence of the system's operation. The NLRB, for instance, found that no sales or transfers of franchises had occurred and that no investment was needed by the franchise dealer.

A later opinion by a New York State Department of Labor Unemployment Insurance Referee in *News Syndicate Co., Inc.*, No. 27-71585, Case No. E-82-68 (1968), however, disagreed with the NLRB's conclusion, concluding that the dealers were not employees after noting that additional proof had disclosed that franchise dealers had a considerable financial interest in their territories, which had been evidenced by sales of franchises for substantial amounts. Furthermore, there is no showing that The News withheld income and Social Security taxes or provided for Workmen's Compensation for its franchise dealers, which would be the usual indicia of an employer-employee relationship. For these reasons we cannot attribute much, if any, weight to the NLRB decision.

In summary, we are persuaded that, although the franchise dealers occupy a position of some independence in the distribution of the News and the parties characterized the distribution as a "sale" of the News to the dealers and by the dealer to the carrier boy, the district court erred in holding that the franchise dealers are "wholesalers" for purposes of the McGuire Act. It was likewise error, in view of all of the circumstances surrounding the employment of the carrier boys, including their relatively tender age (12 to 15 years), to classify them as "retailers." Despite the agreement's language to the effect that the franchise dealers would sell to the carrier boys at one price and that the boys would "resell" to subscribers at a higher price, the fact is that the delivery boy receives a fixed amount for each paper delivered, a result consistent with the more reasonable view that the dealer is more in the nature of a "carrier" or "distributor," who assumes the obligation "to supply all single copy home subscribers within his territory" and the carrier boy is just what his name implies, a delivery boy whose function is to take the News daily to the home subscribers, for which the boy receives a fixed amount per copy.

In view of this conclusion, we hold that Paragraph 5 of the McGuire Act did not invalidate The News' otherwise valid Fair Trade agreements, and that therefore the agreements to fix home delivery prices did not violate the antitrust laws.[10]

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10 We agree with the trial judge's conclusion that nothing in the Feld-Crawford Act invalidates the arrangement here. See *Eastman Kodak Co.* v. *Schwartz*, 133 N.Y.S.2d 908 (Sup. Ct. 1954); *Gillette Safety Razor Co.* v. *Green*, 3 N.Y.S.2d 822 (Sup. Ct. 1938), *aff'd.*, 258 App. Div. 723, 15 N.Y.S.2d 142 (1939).

II. *The News' Action in Preventing Plaintiffs from Obtaining Copies of its Paper and in Imposing Territorial and Customer Restrictions Upon its Franchise Dealers*

Our reversal of the district court's finding of a price-fixing conspiracy does not end our inquiry, for the court also found (1) that to enforce its price maintenance scheme The News unlawfully refused to deal with plaintiffs and combined with franchise dealers and others to prevent plaintiffs from acquiring copies of the News for resale in competition against the franchise dealers, and (2) that territorial and customer restrictions in the franchise agreement unlawfully restrained trade in violation of §1 of the Sherman Act. These practices would not gain immunity from antitrust attack by reason of The News' compliance with Fair Trade laws; and for reasons already noted the charge of conspiracy may not be circumvented on the theory that the franchise dealers were merely The News' employees or agents.

Turning first to the district court's finding that The News unlawfully refused to deal with plaintiffs, we are governed by a few well-established antitrust principles of general application. A publisher or manufacturer has the right unilaterally to choose the customers with whom he may deal, *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919).

> "[F]or this purpose [the manufacturer] may 'franchise' certain dealers to whom, alone, he will sell his goods. Cf. *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919). If the restraint stops at that point —if nothing more is involved than vertical 'confinement' of the manufacturer's own sales of the merchandise to selected dealers, and if competitive products are readily available to others, the restriction on these

facts alone, would not violate the Sherman Act." *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 376 (1967).

Where a manufacturer simply decides on his own to substitute one dealer for another, and cuts off the former dealer, his decision to sell exclusively to a new dealer does not amount to an antitrust "conspiracy" with the latter, *Ark Dental Supply Co.* v. *Cavitron Corp.*, 461 F.2d 1093 (3d Cir. 1972); *Anaya* v. *Las Cruces Sun News*, 455 F.2d 670 (10th Cir. 1972); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970), even though the manufacturer has agreed with the new dealer to transfer patronage to him and to terminate sales to the former dealer, *Ark Dental Supply Co.* v. *Cavitron Corp., supra; Anaya* v. *Las Cruces Sun News, supra.* However, a manufacturer or publisher may not enforce his announced resale prices by active coercion of those who purchase for resale, such as through threats of termination for noncompliance, whether made in combination with others, *Albrecht* v. *Herald Co., supra; United States* v. *Parke Davis & Co.*, 362 U.S. 29 (1960), or alone, *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964).

In the present case The News invited many of the plaintiffs to abandon their independent routes and become its exclusive franchise dealers, advising them that if they chose not to do so The News would find and arrange for distribution through other franchise dealers, which would result in its termination of sales of the News directly to independent route dealers such as plaintiffs. Some independent route dealers accepted The News' offer. Some of the plaintiffs declined the offer and were terminated. The record, however, does not support a finding that the purpose or effect of The News' solicitation was to coerce the

plaintiffs into abandoning their distribution of competing newspapers. The News, on the contrary, adduced testimony that its purpose was simply to offer to the independent route dealers, experienced distributors with whom it had long dealt, the first opportunity to participate in The News' new dealership program, if they chose. If they accepted, it was anticipated that they would sell their independent routes to others, not that they would deprive competing papers of an outlet. Thus the record does not support application of §3 of the Clayton Act, 15 U.S.C. §14, which outlaws a contract for sale "on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessor or seller" where the effect is to substantially lessen competition or create a monopoly.

The News, however, did not limit itself to the establishment of a franchise dealer system, maximum home delivery prices and substitution of new franchise dealers for independent dealers who chose not to become franchise dealers. In addition, each franchise dealer was limited to a specified exclusive territory and to sales to home subscribers within that territory.[11] Moreover, there was evidence that The News and the franchise dealers cooperated to seek out, by means of surveillance, the source from which independent route dealers were obtaining copies of the News and that The News threatened to terminate those

11 Although the Carrier Agreements do not expressly impose territorial or customer restrictions on the franchise dealer, which has led The News to challenge the district court's findings to the contrary, they impliedly do so. Furthermore, in practice the franchise dealers, except in rare instances, sold only to home subscribers in their respective territories. When a franchise dealer attempted to sell to terminated route dealers or to customers outside of his territory The News took steps to prevent or terminate such sales. See *Lepore* v. *New York News, Inc.*, 346 F. Supp. 755, 761 (S.D.N.Y. 1972).

newsdealers and stores who supplied the News to independent route dealers seeking to compete against franchise dealers.

The first question is whether plaintiffs have standing to attack these additional restraints. With respect to The News' assignment of exclusive territories to its franchise dealers, we conclude that as a matter of law, plaintiffs lack standing because they have not asserted antitrust injury to themselves as a result of this practice. This court has held that for an antitrust plaintiff to have standing "[t]here must be a causal connection between an antitrust violation and an injury sufficient for the trier of fact to establish that the violation was a 'material cause' of or a 'substantial factor' in the occurrence of damage." *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); see *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *SCM Corp.* v. *Radio Corp. of America*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969). The district court applied this rule to conclude that no loss suffered by the plaintiffs could be attributed to the clause in the Carrier Agreement requiring the franchise dealers to carry the News exclusively, and dismissed the plaintiffs' claims under §3 of the Clayton Act, 15 U.S.C. §14, from which plaintiffs do not appeal. The court reasoned that the exclusive dealing clause could only benefit the plaintiffs, since it excluded the franchise dealers as potential competitors in the sale of newspapers other than the News. We agree.

Simlar reasoning applies to the exclusive territory agreement. By virtue of this feature of the Carrier Agreement, the independent route dealers are assured of facing competition from no more than one franchise dealer, who is confined to a certain area. The independent is thus spared

the possibility of facing competition from even more sources, and has the option of concentrating his efforts in those territories to which the News has assigned no franchise dealer.[12] The only basis for a claim of injury to plaintiffs from the territorial exclusivity provision might be that the clause is integral to the functioning of the franchise dealer system and that without it the franchise dealers would drive each other out of business, restoring the independents to their former position as the sole distributors of the News. Such a claim would be entirely too speculative to provide standing. Whatever standing a franchise dealer might have to attack the exclusivity arrangement, cf. *United States* v. *Arnold, Schwinn & Co.*, *supra*, it is certainly not shared by the independents.

Plaintiffs' standing to attack The News' agreement with franchise dealers to restrict the customers to whom they could resell the News and to prevent sales of the News by others to the independents, rests on a different footing. There is evidence that many of the independents, due to these restrictions, were put to considerable expense in obtaining copies of the News for distribution to their customers. They could not in some instances obtain sufficient copies for their customers, and they may have faced some loss of business as a result. This claim of injury is sufficient to give the dealers standing to attack the customer-restriction provisions of the Carrier Agreement.

Turning to the merits, we are not here dealing merely with unilateral establishment and enforcement by The

12 The trial judge did find that prior to The News' introduction of the franchise dealer system each of the route dealers had a defined territory which other dealers, pursuant to "horizontal arrangements of doubtful legality," had respected, thus giving each route a certain degree of exclusivity which made it "more or less valuable and salable." However, the extent to which independents have respected each other's territories since introduction of the franchise system is doubtful.

News of exclusive territories and customer limitations, which might conceivably be upheld. In addition there was evidence of a joint effort on the part of The News and some franchise dealers to prevent the independents from competing in territories serviced by franchise dealers. The franchise dealers, upon encountering competition from independents who were still able, although with difficulty, to obtain copies of the News, requested The News to deal with the problem and cut off the supply. The News assured the franchise dealers that the sources would be terminated. Toward that objective there was surveillance of some independents and, upon learning their sources, The News retaliated against the latter by harassing them, threatening them with termination, or actually terminating their supply. Further, The News instructed its franchise dealers to tell customers in their areas that the independent route dealers were no longer in business and that home delivery could be had only through the franchise dealers. It is true that The News offered evidence to the effect that the surveillance and retaliation were merely isolated incidents, growing out of increasing theft of papers by some route dealers, and that it had little or no anticompetitive effects on plaintiffs. However, the district court's findings are supported by evidence and cannot be set aside as clearly erroneous.

The News' conduct, undertaken pursuant to an agreement with the franchise dealers and for the purpose of restricting the access of terminated independents to the News, amounts to an unlawful conspiracy in violation of §1 of the Sherman Act and is remarkably similar to that condemned by the Supreme Court in *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966). In that case a number of dealers, each of whom had been franchised by General Motors to sell GM cars in a "location" assigned

to the dealer in the Los Angeles area, began reselling cars to "discount houses" who then sold to consumers. Other similarly-franchised General Motors dealers thereupon complained about these practices. General Motors reacted by obtaining agreement from each of its franchise dealers not to sell to the discounters. Three associations of its Los Angeles area franchise dealers undertook jointly to police these agreements, supplying information to General Motors which was used to force non-cooperating dealers to refrain from discount house sales.

General Motors argued that the sales to discounters violated its "location" clause in that new sales outlets were thereby established. The Court did not question the legality of the "location" restrictions in the General Motors franchise agreements, or challenge the argument that General Motors might legally have undertaken unilateral action to enforce the provisions. However, it stated:

> "We have here a classic combination in restraint of trade: joint, collaborative action by dealers, the appellee associations, and General Motors to eliminate a class of competitors by terminating business dealings betwen them and a minority of Chevrolet dealers and to deprive franchised dealers of their freedom to deal through discounters if they so choose. Against this fact of unlawful combination the 'location clause' is of no avail. Whatever General Motors might or might not have done to enforce individual Dealer Seller Agreements by action within the borders of those agreements and the relationship which each defines, is beside the point." 384 U.S. at 140.

In the present case, as in *General Motors*, we likewise have far more than voluntary compliance by the franchise dealers with the terms of their agreements with The News

or unilateral action by The News to enforce its vertically-imposed territorial and customer restraints. Here we have proof that The News took action against the independent route dealers at the request of the franchise dealers, and conspired with them to cut off the independents' source of supply, thus excluding the latter as competitors in areas where the franchise system operated. Cf. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). This case, moreover, is more offensive than *General Motors* since here most of the sources of supply, against which surveillance and threats of termination were directed, were not parties to the Carrier Agreement whom The News had an arguable power to control, but independent dealers. The News does not contend that these independent dealers were its "agents" or "employees." At best, therefore, the legality of any attempt to restrict the resale customers of these dealers is highly doubtful, see *United States* v. *Arnold, Schwinn & Co., supra*, 388 US. at 379.

The News argues that the Carrier Agreement does not specifically restrict resales by franchise dealers at all, pointing out that the Agreement merely requires that the franchise dealer purchase from The News "a sufficient number of copies . . . to supply all single copy home subscribers within his territory" and does not specifically prohibit the franchise dealer from purchasing other copies for the purpose of reselling them to other persons. The News then contends that since the district court made no finding that The News was "firm and resolute" in the enforcement of whatever customer restrictions existed, see *Janel Sales Corp.* v. *Lanvin Parfums, Inc., supra*, the restrictions are not offensive. However, this contention is directly contrary to The News' position below, where its counsel conceded that it was against the basic understanding between the parties for a franchise dealer to sell in

bulk to any persons. Moreover, there was evidence that on at least one occasion sales by a franchise dealer to an independent route dealer were terminated following a visit by a News representative to the franchise dealer. In view of the district court's finding that The News terminated or threatened to terminate sales to persons not franchise dealers who made "unauthorized" sales to independent route dealers, it is hardly credible that The News would not have been equally firm in preventing franchise dealers from making such sales. In any event, the question of whether the customer-restriction clause, standing alone, might be upheld is rendered academic by the court's finding, based on substantial evidence, of a conspiracy between The News and franchise dealers to prevent the independents from obtaining copies of The News for distribution.

III. *The District Court's Finding of Conspiracy to Monopolize Intrabrand Competition in the Home Delivery Market by Monopolizing Trade in the News*

Although the district court dismissed plaintiffs' claim of attempt to monopolize the newspaper market in the New York City metropolitan area for failure to prove an intent to monopolize and that home subscribers would not purchase other newspapers in lieu of the News, the court did find that the activities of The News and its franchise dealers in precluding plaintiffs from sources of supply of the News amounted to a conspiracy in violation of §2 of the Sherman Act to eliminate intrabrand competition in the home delivery market by monopolizing trade in the News. We disagree. An essential element of such a conspiracy is an intent to monopolize the designated segment of commerce. *Lewis* v. *Pennington*, 400 F.2d 806, 811 (6th Cir.), *cert. denied*, 393 U.S. 983 (1968); *United States* v.

Consolidated Laundries Corp., 291 F.2d 563, 573 (2d Cir. 1961). Here the trial judge not only failed to make a finding of such intent but, by affirmatively finding that plaintiffs had failed to prove an intent to monopolize the newspaper home delivery market in the New York Metropolitan area, cast doubt upon whether plaintiffs had or could prove an intent to monopolize intrabrand competition in the same home delivery market. While defendants may well have intended to preclude the independent route dealers from distributing the News in areas where franchise dealerships operated, The News did not establish franchise dealerships in many areas where the News was home delivered, including Manhattan, and continued to deal with many independent route dealers. Thus it is unlikely that a specific intent to monopolize the distribution of the News in the home delivery market could be inferred. However, in view of our affirmance of the court's finding that the activities of The News and some franchise dealers amounted to a conspiracy to restrain trade in violation of §1 of the Sherman Act, a retrial of the §2 claim upon remand would appear to be unnecessary.

Conclusion

The News' agreements with its franchise dealers meet the requirements of the McGuire and Feld-Crawford Acts and therefore do not violate the Sherman Act. The record does not support a finding of unlawful coercion of independent route dealers to become franchise dealers or to abandon their distribution of competing newspapers. Plaintiffs lack standing to challenge The News' practice of restricting franchise dealers territorially.

The district court's finding that The News combined with certain franchise dealers in violation of §1 of the Sherman Act to prevent some plaintiffs from obtaining

copies of the News for distribution is affirmed. However, the district court's finding that this activity amounted to a conspiracy to monopolize in violation of §2 of the Sherman Act is reversed.

The district court's dismissal of plaintiffs' claim that The News' sale of its newspaper to the franchise dealers violates the Robinson-Patman Act is affirmed.

The case is remanded to the district court for further proceedings not inconsistent with this opinion, including a hearing to determine the extent to which each franchise dealer participated in the conspiracy to prevent independents from competing in territories serviced by them and to receive proof of any damages suffered by plaintiffs as a result of the actions of the various defendants.[13] Without deciding whether such damages can be established, damages may in any event be awarded only for loss of business or injury to competition suffered by reason of plaintiffs' inability to obtain copies of the News for distribution because of activities of The News in combination with franchise dealers which cut off plaintiffs' sources of supply or threatened or harassed plaintiffs. No liability exists, hence no damages may be awarded, for injury to plaintiffs' business caused by The News' introduction of the franchise dealer system of distribution, the lower home subscription prices resulting from that system, or The News' termination of direct sales to independent route dealers because of its decision to substitute the

13 The argument of appellants Michael and Vito Lepore, presented by them in their separate brief on this appeal, to the effect that there is no evidence to support the claim that they conspired with The News to prevent independent route dealers from competing in territories serviced by franchise dealers must be rejected in view of Michael Lepore's admission that he had advised home subscription customers in his territory "that the independent was no longer in business in their territory." However, upon remand, the district court will determine whether any plaintiff suffered any damages as a result of this conduct.

franchise dealer system. In this connection the claims of the plaintiffs Huntington News Delivery, Inc. (Hand), Edward A. Shank, Harry Fox, Walter Greenberg and Hugh Holman must be dismissed, inasmuch as The News continued to sell directly to these plaintiffs and their sole claims of injury are based on the fact that they operate in areas where the franchise dealer system has been instituted and faced price competition from these dealers and price discrimination from The News, claims which we have held not compensable.

The injunctive relief provisions of the district court's judgment must be modified to accord with the foregoing, eliminating those provisions which enjoin (1) a combination or conspiracy to fix prices (including prices labelled "resale," "wholesale," "retail") (Pars. 1-4 of district court's judgment), (2) a conspiracy to monopolize intrabrand competition in the home delivery of the News (Par. 5 of judgment), (3) territorial or customer restrictions in The News' franchise agreements (Par. 6 of judgment), and (4) termination of independent route dealers (Par. 7 of judgment). The News, however, will be enjoined from surveilling or harassing route dealers for the purpose of preventing them from lawfully obtaining copies of the News, terminating or threatening to terminate dealers or others who lawfully supply copies of the News to route dealers, or falsely advising home delivery subscribers that they can obtain home-delivered copies of the News only through franchise dealers (Pars. 8-11 of judgment).

Each party will bear his or its own costs on this appeal.

APPENDIX C.

Statutes Involved.

Sherman Act, §1, 15 U. S. C. §1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, • • • in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. • • •

Sherman Act, §2, 15 U. S. C. §2:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or

commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, • • •

Robinson-Patman Act, 15 U. S. C. §13:

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: • • •

• • •

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or

without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

McGuire Act, 15 U. S. C. §45.

(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

(2) Nothing contained in this action or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, • • • in which such resale is to be made, or to which the commodity is to be transported for such resale.

• • •

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as

described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

Rule 52(a), Federal Rules of Civil Procedure:

Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury • • • the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 • • •. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. • • •

New York Education Law, §3278

1. Definition: A "newspaper carrier" is a minor between the ages of twelve and eighteen years of age who engages in the occupation of delivering, or selling and delivering, newspapers or periodicals to customers at their homes or places of business.

2. A "newspaper carrier" shall possess a newspaper carrier permit and shall carry it upon his or her person

when engaged in the occupation of delivering, or selling and delivering, newspapers or periodicals to homes or places of business.

First Amendment, United States Constitution:

Congress shall make no law • • • abridging the freedom of speech, or of the press • • •.

Fifth Amendment, United States Constitution:

• • • nor shall any person • • • be deprived of • • • property, without due process of law • • •.